Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 2)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-763 OF 1996
MAHADEV SHANKAR, MOKHTAR SIDIN AND DENIS ONG JJCA
15 NOVEMBER 1997

Companies and Corporations *— Winding up — Petition under s 218 — Whether directors acting in own interests — Whether there was a quasi-partnership in existence — Whether just and equitable to wind up company — Whether petition filed with intention to assist outsiders in claiming assets of the company was made for an improper purpose — Companies Act 1965 s 218(1)(e), (f) & (i)*

Companies and Corporations *— Promoters — Company formed to manage school — Permits issued to the chairman/promoter — Whether the assets and permits belonged to company or promoters — Whether company was a trustee of promoters*

Civil Procedure *— Estoppel — Issue estoppel — Multiplicity of action — Winding-up petition against company — Other proceedings against company — Whether this amounts to multiplicity of proceedings — Whether issue estoppel applies to the parties*

The appellant was an international school originally set up by the Parent-Teacher Association ('PTA') of the Garden School. Among the founding members were Ahmad Roose, PS Sundram and Dr IU Malik ('the group of three') who formed the pro-tem committee that had actively brought about the incorporation of the appellant. On 28 July 1978, the Ministry of Education ('the Ministry') approved the project and operating permits were issued to Ahmad Roose as the chairman. None of the group of three were shareholders of the appellant but the memorandum and articles of association ('the M & A') of the appellant revealed that its two subscribers were Hashimah bte Abdul Aziz and Indrani a/p C Rajaratnam who were the wives of Ahmad Roose and PS Sundram respectively. A first meeting was convened on 22 November 1978 in which Ahmad Roose was appointed the chairman and discussions were made as to the share capital of the appellant and the restrictions on the transfer of shares.

During the chairmanship of one KB Thuraisingam ('KBT'), the appellant had decided on expansion and bought a piece of land at Bukit Belacan with the intention of putting up its own school building. However, when Ahmad Roose later became the chairman again, it was decided at an EGM that the Bukit Belacan land was unsuitable for a school building and was to be sold at a loss. In March 1992, the appellant entered into an agreement with PGK Sdn Bhd for the sale and purchase of a piece of land in Bandar Wangsa Maju. However, the appellant faced difficulties in raising the balance of the purchase price and on 28 July 1992, it entered into a loan agreement with Bitaria Sdn Bhd ('Bitaria') in which Bitaria would provide the appellant with the balance of the purchase price.

On 11 November 1992, an EGM was convened for the purposes of increasing the school fees. At the meeting, KBT — without prior notice of his intention to discuss the issues — started criticizing the board for selling the Bukit Belacan land and the affairs surrounding the purchase of the Wangsa Maju land. KBT then proceeded to move a vote of no confidence against the board. At this juncture, Ahmad Roose declared that he was quitting and walked out of the meeting. Roose and some other members of the board then tendered their resignations while PS Sundram and one Sivananthiran were later voted off the board. PS Sundram had then filed a civil suit against the appellant, KBT and the board. A new board was formed and another EGM was convened on 28 August 1994 with the intention of discussing, inter alia, the increment of the appellant's share capital and to authorize the sale of the shares to Kolej Damansara Utama ('KDU'). Although there were disputes as to the invalidation of the proxies for non-compliance with s 149(1)(b) of the Companies Act 1965 ('the Act'), all the resolutions were passed with the required majority.

The respondents had on 25 August 1994 filed a petition to wind up the appellant under s 218(1)(e), (f) and (i) of the Act which was only served on 9 September 1994. The appellant applied to the High Court for a stay of the winding-up proceedings. At the trial, amongst the issues raised was the question of ownership of the operating permits issued by the Ministry and assets of the appellant and whether there were multiplicity of proceedings in both the winding-up petition and the civil suit filed by PS Sundram. The trial judge held, inter alia, that the appellant was in effect a 'domestic company' which was created only to oversee the management of the schools. It was only a trustee of the founder members and the permits and assets belonged to them. Although the trial judge rejected the ground of petition under s 218(1)(e) of the Act, he allowed the winding-up under s 218(1)(f) of the Act on the ground that the board of directors had acted in their own interest by failing to inform the shareholders of their invalid proxy before the 28 August 1994 EGM and by failing to adjourn the meeting. Further, the conduct of the board in disposing of the assets of the school to KDU would constitute an unconscionable conduct justifying winding up under s 218(1)(i) of the Act. The trial judge held that the appellant was in fact a quasi-partnership and the sale of shares to KDU would destroy the 'family relationship' which was the crux of the appellant's existence. However, despite the appellant's winding-up, the trial judge had ordered the school to remain open. The trial judge also held that since the submission on the multiplicity of proceedings had been rejected twice by two other judges earlier, he would also reject the submission. The appellant appealed.

Held, allowing the appeal:

(1) The trial judge had overlooked the fact that the first application to the Ministry was not made by the group of three in their

personal capacity but as agents of the entire group of individuals who constituted the PTA of the Garden School. They were not a power unto themselves but only a pro-tem committee on behalf of all the individuals who lent their support to the idea of the appellant's formation. The names of Roose and various other individuals who succeeded him were inserted in the permit not to show ownership of it but only to indicate the identity of the person who as chairman was charged with the responsibilities of carrying out the requirements under the Education Act 1961.

Also, the finding of the trial judge that the purchase value of the share was a refundable deposit was a misdirection in law and fact. It is illegal for a company to utilize its share capital to refund a shareholder for any shares returned. This could only be achieved through an exercise in reduction of capital. Furthermore, the minutes of the 22 November 1978 meeting showed that the deposit which was refundable was the deposit made as security for fees which was to go into a separate account (see pp 138H–I and 139A–B, F–G).

(2) The holding that the appellant was a 'domestic company' and therefore there was a restriction on the transfer of shares was a misdirection in law. Despite the decision of the 22 November 1978 meeting which restricted the transfer of shares, it was superseded by the M & A which did not impose such restriction. Further, the finding that the appellant was a trustee of the founder members could not stand scrutiny. Everything that is put under a company's name upon incorporation belongs to the company alone in the absence of the contrary in the M & A or any formal contract executed with the consent of the shareholders. It was difficult to envisage that the group of three had intended to bear the liabilities of the appellant in the land transactions if in fact the appellant was only an agent or trustee for them. The trial judge in vesting the assets on the founder members had failed to take into account these liabilities (see pp 139I, 140A, I, 141A–B and 142A–F).

(3) On the issue of winding-up under s 218(1)(f) of the Act, the crucial question was whether the new board of the appellant had acted in their own interest or in a manner which they thought would benefit the appellant and the shareholders. There was no evidence that any secret profit or personal gain was made out of the arrangement with KDU. The trial judge had failed to take into account the views of the shareholders and creditors which opposed the petition and the fact that the special resolutions passed on 28 November 1994 had the support of at least 75% of shareholders present and voting. Therefore, the petitioners' case under s 218(1)(f) of the Act was a non-starter (see p 143B–C, E–F).

(4) On the issue of winding-up under s 218(1)(i) of the Act, the finding that the assets belonged only to the appellant must negate the suggestion that there was a quasi-partnership in existence. The court must not ignore the agreements between the parties

which were reflected in the M & A, in pursuit of what it regarded as fair. Therefore, the reliance on *Ebrahimi*'s and *Re Yenidje*'s cases was misplaced (see pp 143H–I and 144B); *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492 and *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 distinguished.

Moreover, in exploring ways to preserve the company as a going concern, far from terminating the company's prime objective, the new board was seeking to perpetuate its existence. Also, the trial judge's view that the non-compliance of s 149(1)(b) of the Act did not invalidate the proxies was incorrect. An illegal practice cannot become legal by usage. Section 149(1)(b) means what it says and must be complied with. It was not right for the trial judge to hold that it was just and equitable to penalize the appellant when the board did precisely what the law required it to do. There was also no evidence that the directors had acted in their own interest (see pp 145A–B, 146H and 147A).

(5) The way the case had been fought led to the inference that the petitioners were actually fighting for the group of three to whom they said that the permits and the appellant's assets belonged. Where outsiders are claiming that property registered in the name of a limited company is theirs, the proper route is to file a civil suit in detinue or conversion or even a declaration that the property is being held on trust for the claimant. To utilize minority shareholders to destroy the corporate edifice through a winding-up petition is a misuse of the court's process. Therefore in so far as the petitioners had lent their assistance in filing this petition, they did so for an improper purpose and the petition should have been dismissed on that ground (see p 147E–F, H–I).

(6) On the issue of multiplicity of proceedings, the trial judge should have ruled in favour of the appellant. The real contest here was between the group of three on one side and the appellant and the educational authorities on the other. The fact that the group of three had fully embroiled themselves with the present proceedings would mean that issue estoppel would apply to them on all matters decided in this appeal (see p 149B–D).

Per curiam:

(1) Where two groups of shareholders are at war with each other on matters of company policy, the proper way to resolve such disputes is by the democratic process of the majority vote. The Act and the M & A of the appellant contained inherent safeguards to achieve this. If the majority did not like what happened on 11 and 17 November 1992, they could have requisitioned a new meeting and voted the new board out (see p 148A–B).

(2) The final order of the court under s 221(1) of the Act should be to direct a winding-up or dismiss the petition. The power to deal with the assets of the company is vested in the liquidator and not the court. The court's attempts to preserve the assets and the school as a going concern so that it could be handed over to the

group of three was therefore misconceived (see p 150C–D); *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 followed.

(3) Regardless of the merits, the trial judge's orders for the costs of the petition to be paid by the directors who took over the board on 11 November 1993 were also misconceived. Courts should not make orders against persons who are not parties to the proceedings and who have not been heard why such orders should be made against them (see p 150E).

[Bahasa Malaysia summary

Perayu adalah sebuah sekolah antarabangsa yang pada asalnya ditubuhkan oleh Persatuan Ibu Bapa dan Guru ('PIBG') Garden School. Di antara ahli pengasas adalah Ahmad Roose, PS Sundram dan Dr IU Malik ('kumpulan bertiga') yang membentuk jawatankuasa sementara yang secara aktif telah membawa kepada pemerbadanan perayu. Pada 28 Julai 1978, Kementerian Pendidikan ('Kementerian tersebut') meluluskan projek dan permit-permit pengendalian telah dikeluarkan kepada Ahmad Roose sebagai pengerusi. Tidak seorang pun daripada kumpulan bertiga merupakan pemegang saham perayu tetapi memorandum dan tataurusan persatuan ('M & T') perayu menunjukkan bahawa dua penyumbangnya adalah Hashimah bte Abdul Aziz dan Indrani a/p C Rajaratnam yang merupakan isteri-isteri Ahmad Roose dan PS Sundram masing-masing. Mesyuarat pertama bersidang pada 22 November 1978 di mana Ahmad Roose dilantik sebagai pengerusi dan perbincangan dibuat berkenaan dengan modal saham perayu dan sekatan-sekatan atas pemindahan saham.

Semasa dipengerusikan oleh seorang bernama KB Thuraisingam ('KBT'), perayu telah memutuskan untuk berkembang dan membeli sebidang tanah di Bukit Belacan dengan tujuan membina bangunan sekolahnya sendiri. Bagaimanapun, apabila Ahmad Roose kemudiannya menjadi pengerusi sekali lagi, adalah diputuskan di EGM bahawa tanah di Bukit Belacan tidak sesuai untuk membina sekolah dan perlu dijual dengan harga yang merugikan. Pada bulan Mac 1992, perayu mengikat suatu perjanjian dengan PGK Sdn Bhd untuk jualan dan belian sebidang tanah di Bandar Wangsa Maju. Bagaimanapun, perayu menghadapi kesukaran dalam mengumpulkan baki harga beli dan pada 28 Julai 1992, ia mengikat suatu perjanjian pinjaman dengan Bitaria Sdn Bhd ('Bitaria') di mana Bitaria akan menyediakan baki harga beli kepada perayu.

Pada 11 November 1992, satu EGM bersidang untuk tujuan menambahkan yuran sekolah. Di mesyuarat itu, KBT — tanpa notis terdahulu tentang hasratnya untuk membincangkan isu-isu itu — mula mengkritik lembaga kerana menjual tanah di Bukit Belacan dan urusan-urusan berkenaan dengan pembelian tanah di Wangsa Maju. KBT kemudiannya terus memulakan undi tidak percaya terhadap lembaga. Pada masa ini, Ahmad Roose mengisytiharkan bahawa beliau akan berhenti dan keluar daripada mesyuarat itu. Roose dan beberapa orang ahli lembaga kemudiannya menyerahkan perletakan

jawatan mereka sementara PS Sundram dan seorang bernama Sivananthiran kemudiannya disingkirkan daripada lembaga. PS Sundram kemudiannya telah memfailkan guaman sivil terhadap perayu, KBT dan lembaga. Lembaga yang baru dibentuk dan satu lagi EGM bersidang pada 28 Ogos 1994 dengan tujuan membincangkan, antara lain, penambahan modal saham perayu dan untuk memberi kuasa penjualan saham-saham kepada Kolej Damansara Utama ('KDU'). Walaupun terdapat pertikaian berkenaan dengan pentaksahan proksi-proksi kerana tidak mematuhi s 149(1)(b) Akta Syarikat 1965 ('Akta tersebut'), semua resolusi diluluskan dengan majoriti yang diperlukan.

Penentang telah pada 25 Ogos 1994 memfailkan suatu petisyen untuk menggulungkan perayu di bawah s 218(1)(e), (f) dan (i) Akta tersebut yang hanya disampaikan pada 9 September 1994. Perayu memohon kepada Mahkamah Tinggi untuk penggantungan prosiding penggulungan. Pada masa perbicaraan, di antara isu-isu yang ditimbulkan adalah persoalan pemunyaan permit-permit pengendalian yang dikeluarkan oleh Kementerian tersebut dan aset-aset perayu dan sama ada terdapat kepelbagaian prosiding dalam kedua-dua petisyen penggulungan dan guaman sivil yang difailkan oleh PS Sundram. Hakim perbicaraan memutuskan, antara lain, bahawa perayu pada hakikatnya adalah 'syarikat domestik' yang dibentuk untuk memerhatikan pengurusan sekolah-sekolah. Ia hanyalah pemegang amanah kepada ahli-ahli pengasas dan permit-permit dan aset-aset adalah kepunyaan mereka. Walaupun hakim perbicaraan menolak alasan petisyen di bawah s 218(1)(e) Akta tersebut, beliau membenarkan penggulungan di bawah s 218(1)(f) Akta tersebut atas alasan bahawa lembaga pengarah telah bertindak dalam kepentingan mereka sendiri kerana gagal untuk memberitahu pemegang-pemegang saham berkenaan dengan ketaksahan proksi mereka sebelum EGM pada 28 Ogos 1994 dan kerana gagal untuk menangguhkan mesyuarat itu. Selanjutnya, tindakan lembaga dalam menjual aset-aset sekolah kepada KDU adalah tindakan yang tidak berpatutan yang menjustifikasikan penggulungan di bawah s 218(1)(i) Akta tersebut. Hakim perbicaraan memutuskan bahawa perayu adalah pada hakikatnya kuasi-perkongsian dan penjualan saham-saham kepada KDU akan memusnahkan 'hubungan kekeluargaan' yang menjadi pokok kepada kewujudan perayu. Bagaimanapun, walaupun penggulungan perayu, hakim perbicaraan telah memerintahkan supaya sekolah itu kekal dibuka. Hakim perbicaraan juga memutuskan bahawa oleh kerana penghujahan berkenaan dengan kepelbagaian prosiding telah ditolak sebanyak dua kali oleh dua orang hakim sebelum ini, beliau juga menolak penghujahan itu. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan telah terlepas perhatian terhadap fakta bahawa permohonan pertama kepada Kementerian tersebut tidak dibuat oleh kumpulan bertiga dalam keupayaan persendirian mereka tetapi sebagai ejen-ejen keseluruhan kumpulan individu-individu yang membentuk PIBG Garden School. Mereka bukannya kuasa ke atas mereka sendiri tetapi hanya jawatankuasa sementara bagi

pihak semua individu yang memberikan sokongan mereka kepada cadangan pembentukan perayu. Nama Roose dan berbagai individu lain yang menggantikannya dimasukkan ke dalam permit bukan untuk menunjukkan pemunyaan tetapi hanya untuk menunjukkan identiti orang yang sebagai pengerusi telah diberikan tanggungjawab untuk menjalankan kehendak-kehendak di bawah Akta Pelajaran 1961.

Juga, pendapat hakim perbicaraan bahawa nilai belian saham adalah deposit yang boleh dikembalikan adalah satu salah arah dalam undang-undang dan fakta. Adalah salah di sisi undang-undang untuk syarikat menggunakan modal sahamnya untuk mengembalikan kepada pemegang saham bagi mana-mana saham yang dipulangkan. Ini hanya boleh dicapai melalui pelaksanaan pengurangan modal. Tambahan pula, minit mesyuarat pada 22 November 1978 menunjukkan bahawa deposit yang boleh dikembalikan adalah deposit yang dibuat sebagai jaminan untuk yuran-yuran yang perlu dimasukkan ke dalam akaun yang berasingan (lihat ms 138H–I dan 139A–B, F–G).

(2) Keputusan bahawa perayu adalah 'syarikat domestik' dan oleh itu terdapat sekatan atas pemindahan saham-saham adalah satu salah arah dalam undang-undang. Walaupun keputusan mesyuarat pada 22 November 1978 menyekat pemindahan saham, ianya digantikan oleh M & T yang tidak mengenakan sekatan sedemikian. Selanjutnya, pendapat bahawa perayu adalah pemegang amanah kepada ahli-ahli pengasas tidak boleh diteliti. Apa-apa yang diletakkan di bawah nama syarikat pada masa pemerbadanan adalah kepunyaan syarikat itu sendiri dengan ketiadaan apa-apa yang bertentangan dalam M & T atau apa-apa kontrak formal yang dilaksanakan dengan kebenaran pemegang saham. Adalah sukar untuk membayangkan bahawa kumpulan bertiga berhasrat untuk menanggung liabiliti perayu dalam transaksi tanah jika pada hakikatnya perayu hanyalah ejen atau pemegang amanah bagi mereka. Hakim perbicaraan dalam meletakhak aset-aset atas ahli-ahli pengasas telah gagal mengambil kira liabiliti-liabiliti ini (lihat ms 139I, 140A, I, 141A–B dan 142A–F).

(3) Berkenaan dengan isu penggulungan di bawah s 218(1)(f) Akta tersebut, persoalan yang penting adalah sama ada lembaga baru perayu telah bertindak dalam kepentingan mereka sendiri atau dalam cara yang mereka fikir akan memanfaatkan perayu dan pemegang saham. Tidak ada bukti bahawa apa-apa keuntungan rahsia atau keuntungan persendirian telah dibuat daripada urusan dengan KDU. Hakim perbicaraan telah gagal untuk mengambil kira pandangan pemegang-pemegang saham dan pemiutang-pemiutang yang menentang petisyen itu dan fakta bahawa resolusi khas yang diluluskan pada 28 November 1994 mendapat sokongan daripada sekurang-kurangnya 75% daripada pemegang-pemegang saham yang hadir dan mengundi. Oleh itu, kes pempetisyen di bawah s 218(1)(f) Akta tersebut bukannya pemula (lihat ms 143B–C, E–F).

(4) Berkenaan dengan isu penggulungan di bawah s 218(1)(i) Akta tersebut, pendapat bahawa aset-aset adalah kepunyaan perayu mesti menolak cadangan bahawa terdapat kuasi-perkongsian yang wujud. Mahkamah tidak boleh mengabaikan perjanjian-perjanjian di antara pihak-pihak yang ditunjukkan dalam M & T, bagi tujuan yang difikirkannya sebagai adil. Oleh itu, pergantungan kepada kes-kes *Ebrahimi* dan *Re Yenidje* adalah salah tempat (lihat ms 143H–I dan 144B); *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492 dan *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 dibeza.

Tambahan lagi, dalam mencari cara untuk mengekalkan syarikat supaya terus beroperasi, lembaga baru jauh daripada menghentikan objektif utama syarikat berusaha untuk mengekalkan kewujudannya. Juga, pendapat hakim perbicaraan bahawa ketidakpatuhan s 149(1)(b) Akta tersebut tidak mentaksahkan proksi-proksi adalah salah. Amalan yang salah di sisi undang-undang tidak boleh menjadi sah melalui penggunaan. Seksyen 149(1)(b) bermakna apa yang dikatakannya dan mesti dipatuhi. Adalah tidak betul bagi hakim perbicaraan untuk memutuskan bahawa adalah adil dan saksama untuk mendenda perayu apabila lembaga membuat apa yang dengan tepatnya dikehendaki oleh undang-undang untuk dilakukan. Juga tidak terdapat bukti bahawa pengarah-pengarah telah bertindak dalam kepentingan mereka sendiri (lihat ms 145A–B, 146H dan 147A).

(5) Cara bagaimana kes ditentang memberikan inferens bahawa pempetisyen sebenarnya berjuang untuk kumpulan bertiga yang mereka mengatakan bahawa permit-permit dan aset-aset perayu dipunyai oleh mereka. Di mana orang luar menuntut bahawa harta yang didaftarkan dalam nama syarikat berhad adalah kepunyaan mereka, cara yang betul adalah untuk memfailkan guaman sivil dalam detinu atau penukaran atau deklarasi bahawa harta itu dipegang atas amanah untuk pihak menuntut. Untuk menggunakan pemegang saham minoriti bagi memusnahkan perbadanan melalui petisyen penggulungan adalah satu salahguna proses mahkamah. Oleh itu, sejauh mana pempetisyen-pempetisyen telah menolong dalam pemfailan petisyen ini, mereka melakukannya untuk tujuan yang tidak betul dan petisyen itu patut ditolak atas alasan itu (lihat ms 147E–F, H–I).

(6) Berkenaan dengan isu kepelbagaian prosiding, hakim perbicaraan sepatutnya memutuskan memihak kepada perayu. Pertentangan yang sebenar di sini adalah di antara kumpulan bertiga pada satu pihak dan perayu dan pihak berkuasa pelajaran pada pihak yang lain. Hakikat bahawa kumpulan bertiga telah membabitkan diri mereka sepenuhnya dengan prosiding ini bermakna bahawa isu estopel akan terpakai kepada mereka atas semua perkara yang diputuskan dalam rayuan ini (lihat ms 149B–D).

Per curiam:

(1) Di mana dua kumpulan pemegang saham bertentangan di antara satu sama lain atas perkara-perkara polisi syarikat, cara yang betul untuk menyelesaikan pertikaian sedemikian ialah dengan proses demokratik undi majoriti. Akta tersebut dan M & T perayu mengandungi pelindung sedia ada untuk mencapainya. Jika majoriti tidak bersetuju dengan apa yang berlaku pada 11 dan 17 November 1992, mereka boleh menuntut mesyuarat yang baru dan menyingkirkan lembaga baru (lihat ms 148A–B).

(2) Perintah muktamad mahkamah di bawah s 221(1) Akta tersebut sepatutnya mengarahkan penggulungan atau menolak petisyen. Kuasa untuk menguruskan aset-aset syarikat diletakhak dalam penyelesai dan bukannya mahkamah. Cubaan mahkamah untuk mengekalkan aset-aset dan sekolah supaya terus beroperasi supaya ia dapat diberikan kepada kumpulan bertiga adalah dengan itu salah tanggap (lihat ms 150C–D); *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 diikut.

(3) Tanpa mengira merit, perintah hakim perbicaraan untuk kos petisyen untuk dibayar oleh pengarah-pengarah yang mengambil alih lembaga pada 11 November 1993 juga salah tanggap. Mahkamah-mahkamah tidak sepatutnya membuat perintah-perintah terhadap orang yang bukan pihak-pihak kepada prosiding dan yang tidak didengar mengapa perintah-perintah sedemikian sepatutnya dibuat terhadap mereka (lihat ms 150E).]

Notes

For cases on petition under s 218, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 846–848.

For cases on the just and equitable rule, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 723–743.

For cases on promoters, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 360–361.

For a case on issue estoppel, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1222.

Cases referred to

Blue Arrow plc, Re [1987] BCLC 585 (refd)

Chesterfield Catering Co Ltd, Re [1976] 3 WLR 879 (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1972] 2 All ER 492 (distd)

Eddystone Marine Insurance, Re [1893] 3 Ch 9 (refd)

Hampshire Land Co, Re [1896] 2 Ch 743 (refd)

JE Cade & Son Ltd, Re [1992] BCLC 213 (refd)

Lim Kit Siang v United Engineers (M) Bhd & Ors [1988] 1 MLJ 35 (refd)

Lo Siong Fong, Re [1994] 2 MLJ 72 (refd)

Nana Offori Atta II & Anor v Nana Abu Bonsra II & Anor [1957] 3 WLR 830 (refd)

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Sin Lee Sang Sawmill Sdn Bhd, Re [1990] 1 MLJ 250 (refd)
Sio Koon Lin v SB Mehra [1981] 1 MLJ 225 (refd)
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668 (refd)
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd [1996] 1 MLJ 661 (refd)
United Malayan Banking Corp v Palm & Vegetable Oils [1983] 1 MLJ 206 (refd)
Vandervell's Trusts, Re [1974] 1 All ER 47 (refd)
Yenidje Tobacco Co Ltd, Re [1916] 2 Ch 426 (distd)

Legislation referred to

Companies Act 1965 ss 14A, 64, 67, 123(4), 128, 144, 149(1)(b), 181, 218(1)(e), (f), (i), 221, 364
Contracts Act 1950 s 183
Education Act 1961 ss 2, 44, 45, 46, 47, 48, 49, 53
Evidence Act 1950 s 114(e)
Government Proceedings Ordinance 1956 s 29
Rules of the High Court 1980 O 18 r 19, O 59 r 19

WSW Davidson (*Conrad Young* with him) (*Azman Davidson & Co*) for the appellant.
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Yusof Khan (*Yusof Khan & Pathmanathan*) for the respondents.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This appeal is to determine whether the High Court was right to order the winding-up of Fairview Schools Bhd ('FSB'). The judgment is now reported as *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd* [1997] 5 MLJ 267. For reasons which will follow later, the salient facts have to be restated.

The respondents in this appeal were the petitioners in the court below. They are referred hereafter as the petitioners. Their whole case was based on an assertion that the permit issued by the government to run the schools belonged to Ahmad Roose, PS Sundram ('Sundram') and Dr IU Malik ('the group of three'). They claimed that FSB was merely a trustee of all its assets for the group of three. They even claimed that the liabilities of FSB were the personal concern of the incumbent directors of FSB after 11 November 1992.

The point of origin of these claims is a letter dated 28 July 1978 from the Ministry of Education ('the Ministry'). There is a purported copy of the Ministry's letter dated 28 July 1978 annexed to Sundram's written submission in the court below. It is not signed. The letter head contains the Ministry's fax number.

Ahmad Roose also exhibited a purported copy of this letter in his affidavit affirmed on 20 January 1995. It is a photostat of the same document. It is also not signed.

The third copy of the Ministry's letter was exhibited by Pn Arpah bte Haji Mohamad, the Deputy Director General of Education in her affidavit of 19 April 1996. Sundram had filed Civil Suit No S4–22–594–93 on 4 October 1993 for declaratory relief alleging wrongful dismissal from his post as managing director of FSB. The winding-up petition was filed on 25 August 1994. Before the winding-up petition was heard, the group of three filed Originating Motion No R1–25–9–25 against the chief registrar of schools and the Ministry of Education for a mandamus. The object of this exercise was to restore Ahmad Roose as the permit holder as opposed to K Balan Thurasingham ('KBT'). The civil suit and the mandamus proceedings have been put on hold pending the disposal of this appeal. The files relating to those matters are not before us. However, Pn Arpah's affidavit aforesaid which was filed in the mandamus proceedings was introduced into evidence in this matter without objection in the court below. It contains the only signed and authentic file copy of the Ministry's letter. The date 28 July 1978 has been overwritten to read 3 August 1978 and the letter is signed by P Navaratnarajah. The authenticity of the date 3 August 1978 is confirmed by Ahmad Roose's reference to it in his letter dated 1 March 1979. Since faxes were not in use in 1978, it must follow that the unsigned copies relied on by Sundram and Ahmad Roose are of a later vintage. The contents of all three letters however are identical, so nothing should turn on this.

The proper interpretation to be placed upon this letter is hotly disputed. Whilst the group of three may have been the active individuals concerned in setting up Fairview Schools, the first paragraph of this letter categorically states that the request to set up schools named 'Fairview Schools Association' at 40 Jalan Utara, Bukit Bintang and 216 Jalan Pekeliling, Kuala Lumpur came *not* from any or all the individuals of the group of three but from the Parent-Teacher Association of the Garden School. The Fairview Schools Association is hereafter referred to as 'FSA'. The Ministry's letter is addressed, not to Ahmad Roose but, to the registrar of schools. The second paragraph states that the Ministry has no objection in principle to the establishment of such schools because it was intended for expatriate children and was not profit oriented. The third paragraph directed the registrar to issue a temporary certificate, not to Ahmad Roose personally, but to the chairman of the schools subject to nine conditions of which only the following conditions are material:

(i) the name of the schools is Fairview Schools Association;

(vii) the audited accounts of the schools for each year and statements of accounts be sent to the registrar and the Ministry; and

(viii) the schools, teachers and members of the board must be registered.

It was not a condition that the schools should be non-profit making.

A The fourth paragraph of this letter required the registrar to inform the chairman of the schools that the nine conditions enumerated cannot be changed without the written permission of the Ministry. The fifth paragraph stated that, provided the conditions were observed, the temporary certificate could be extended.

B A copy of this letter was extended, not to Ahmad Roose personally, but to the chairman of FSA at Section 6, Lorong Damai Lapan, Kuala Lumpur which is Ahmad Roose's residential address.

The proper inferences as to the history of the Fairview Schools are that the Parent-Teacher Association of the Garden School decided to set C up an alternative international school. Its members described itself as Fairview Schools Association. Ahmad Roose was appointed pro-tem chairman. In the name of the Parent-Teacher Association, a request was made to the Ministry for approval to set up an alternative international school. By its letter dated 28 July 1978, the Ministry gave its blessings to their project.

D The original certificates issued in 1978 are not in evidence. The earliest copy in the appeal record dates from 11 April 1983. However, according to a statement by Sundram, the first certificates were issued on 1 September 1978. He stated:

> Butir-butir sijil pendaftaran sementara sekolah (SPSS) dan Pengerusi E Lembaga Sekolah Fairview dari tahun 1978 hingga 1994
>
> 1 September 1978 — SPSS pertama kali dikeluarkan atas nama:
>
> (a) Persatuan Sekolah Menengah Fairview — No SPSS JPWP: 720
>
> (b) Persatuan Sekolah Rendah Fairview — No SPSS JPWP: 721
>
> (c) Persatuan Taman Kanak-kanak Fairview — No SPSS JPWP: 722 F
>
> Alamat: 216, Jalan Pekeliling
> Kuala Lumpur
>
> Nama pengerusi yang tercatit dalam ketiga-tiga SPSS itu ialah:
> Encik Ahmad Roose bin Haji Mohd Ali
> G Alamat: Section 6, Lorong Damai 8,
> Kuala Lumpur

These certificates are also referred to as 'permits' or 'sijils'.

At this juncture, it must be emphasized that there never was at any time a legal entity registered as 'Fairview Schools Association'. Indeed in H 1983, the names of all three permits were changed to Sekolah Fairview (Menengah), (Rendah) and (Tadika) respectively whilst the certificate numbers remained the same, ie 720, 721 and 722.

Sundram claims that under the first three certificates, the group of three commenced to conduct classes at 216 Jalan Pekeliling. Their concept I of the institutional framework under which they were to operate was the subject of legal advice. The only reasonable inference from Ahmad Roose's letter dated 17 November 1978 is that after the Parent-Teacher Association of the Garden School had decided to set up the FSA, the Association had

applied to the Registrar of Companies for approval to incorporate *a limited company* named Fairview Schools Association. Indeed, there is evidence under the hand of Ahmad Roose himself that even before the sanction of the Registrar of Companies had been obtained, the group of three had printed letterheads describing themselves as 'The Fairview Schools Association (a company limited by guarantee)'. It is a fair inference that this was the style under which they did business until the Registrar of Companies rejected the name. The statement that FSA was a company limited by guarantee was false (see s 364 of the Companies Act 1965). Indeed such a company is prohibited by s 14A of the Companies Act 1965 ('the Act').

It is also obvious from that same letter dated 17 November 1978 written by Ahmad Roose to the manager of Bank Bumiputera ('BBMB'), that Ahmad Roose was holding himself out as a director of this company and that 21 cheques had been collected from the parents. Ahmad Roose directed the bank manager to open an account in the name of Fairview Schools Bhd ('FSB') and pay all the cheques into that account. The second paragraph of this letter reads:

> You will note that some of the cheques are made payable to the Fairview Schools Association while others are made payable to Fairview Schools Bhd or Fairview Schools. The *beneficiary* in all cases is the Fairview Schools Bhd (the change in the name of the school became necessary when the Registrar of Companies did not accept the name of the company as the Fairview School Association). A copy of the memorandum and articles of association of the Fairview Schools Bhd is attached. At the moment, the official certificate of incorporation of the company is awaited and will be forwarded to you as soon as it becomes available. (Emphasis added.)

Turning to the memorandum and articles of association ('the M & A') of FSB, it is observed that the two subscribers who signed the M & A on 9 November 1978 in the presence of their solicitors were Hashimah bte Abdul Aziz who is the wife of Ahmad Roose and Indrani a/p C Rajaratnam who is the wife of Sundram.

The M & A is a fairly standard document. The first object clause in the memorandum of any company has always been treated with the utmost reverence as representing the primary or predominant purpose for which the company has been set up. In this case, it reads:

> To establish and carry on in Malaysia and/or elsewhere, schools, colleges or institutions of education or learning and to provide facilities for the advancement of education, whether general, commercial, professional or technical, except that such education shall not be of a political nature.

Nowhere in the M & A does it state that FSB's role was to act as a trustee or manager only and that the beneficiary and owner of the assets of the schools was to belong to the group of three or anyone else. The name of the company was thus not an alias or style under which the group of three was trading.

Again, nowhere in the M & A is there any provision for founder shares for the group of three or any hint that ownership or control of FSB's

assets should be retained by the group of three (as to this see LCB Gower, *Modern Company Law*, (4th Ed) p 333 especially note 63 and *Re Eddystone Marine Insurance* [1893] 3 Ch 9). Under the M & A, all shareholders had equality of rights and votes. It is trite law that the M & A represents the contract inter se between all members of the company (see s 33 of the Act).

Five days after FSB's bank account was opened as aforesaid, 29 parents attended a meeting at the schools' premises. The group of three were present with their wives. So were 11 teachers. Minutes of this meeting captioned 'Fairview Schools Bhd' are in evidence. Ahmad Roose was elected chairman. Sundram was voted ad hoc secretary. The relevant minutes read:

> The chairman expressed his appreciation for the confidence placed in him and proceeded to give a status report on the development in relation to the schools. He outlined some of the problems relating to the setting up of a non-profit company and the name proposed for it.
>
> After discussions with the legal firm (Tunku Zuhri, Manan & Abdullah) and the Registrar of Companies, *the members of the pro-tem committee* (En Ahmad Roose, Dr IU Malik and Mr PS Sundram) have decided on the following:
>
> (i) The name of the company will be Fairview Schools Bhd.
>
> (ii) Steps have been taken to register the company which will be done soon.
>
> (iii) The subscribing shareholders were Pn Hashimah Roose and Mrs Indrani Sundam.
>
> (iv) The number of shareholders will be more than 50.
>
> (v) The authorized capital of the company will be RM200,000.

The meeting after some discussion also made the following decisions:

> (i) Each share will cost RM50 and one family will purchase one share.
>
> (ii) The share should be transferable and when a parent whose child or children is/are withdrawn from the school, the share will be transferred to the next parent on the list or the next incoming parent. As for parents who have to leave the country by a certain date, the board of directors will devise a scheme to purchase the shares pending resale to another parent.
>
> (iii) The share costs will not be deducted from the deposit because of the audit and inland revenue implications and again because the deposit being by definition and intent refundable should be refunded in full on receipt of a demand notice of reasonable time.

The story that these minutes tell is that all those present and not just the group of three took part in settling the key issues relating to the establishment of the company including its name, its authorized capital, number of shareholders, issue of shares, and appointment of office bearers.

FSB was issued with its certificates of incorporation on 18 December 1978. The 'sijils' issued on 1 September 1978 being of six months duration expired on 28 February 1979. The letter Ahmad Roose wrote to the

Ministry on 1 March 1979 is so very significant that it deserves to be set out in full. It reads:

Fairview Schools Bhd

Berhubung dengan surat kementerian bertarikh 3 Ogos 1978 membenarkan kami menjalankan sebuah sekolah Inggeris bernama Fairview Schools Association (ref Kp5195/l 7/SEL/A/SK IV(22)). Dengan hormatnya adalah dimaklumkan bahawa Pendaftar Syarikat (Registrar of Companies) telah menolak permohonan kami mendaftarkan sebuah syarikat di atas nama 'The Fairview Schools Association' dengan cara 'limited by guarantee'. Sebaliknya, Pendaftar Syarikat itu mendaftarkan syarikat kami di atas nama 'Fairview Schools Bhd' pada 18 Disember 1978.

Bersama-sama ini saya sertakan satu salinan photostat sijil pendaftaran tersebut untuk makluman tuan.

Tujuan saya menulis surat ini ialah memaklumkan tuan tentang pertukaran nama syarikat kami itu. Sila ambil perhatian.

Terima kasih.

Yang benar,

tt
(Ahmad Roose, FIBA)
Pengerusi
Fairview Schools

sk Ketua Pelajaran, Selangor,
Jabatan Pelajaran,
Jalan Maxwell,
Kuala Lumpur

His letter refers to the Ministry's letter granting permission dated not 28 July 1978 but 3 August 1978 which is also the date of Pn Arpah's file copy attached to her affidavit. Ahmad Roose's own statement as to why the name FSA was changed to FSB and the assertion that Fairview School Bhd was the new name of the company previously known as Fairview Schools Association (a company limited by guarantee) has left us in no doubt that the proposed vehicle or institution remained the same, even though its name and legal character was changed by force of law. Also significant is the designation under which Ahmad Roose signed this letter. 'Chairman, Fairview Schools', and his use of the words, 'syarikat kami' in his representative capacity.

Ahmad Roose wrote to the Ministry because that the first condition imposed by the Ministry's letter was that the name of the schools was 'Persatuan Sekolah Fairview'. The consent of the Ministry was therefore required to change it to 'Fairview Schools'.

The Ministry's reply to this letter is not before us. Nor are the 'sijils' issued from 1 March 1979 to 11 April 1983. But looking at the 'sijils' dated 11 April 1983, it is obvious that the Ministry must have agreed to the change because the name of the schools now reads 'Sekolah Fairview (Menengah), (Rendah) and (Tadika)' as the case may be. The 'sijils' state that the schools had been registered provisionally (see s 48 of the Education

A Act 1961) in accordance with the Education Act 1961 and that the name of the chairman is Dato' Ahmad Yunus. In the absence of the 'sijils' from 1 September 1978 for the total duration of this case, we must assume the 'sijils' are in prescribed form (see s 48(2) of the Education Act 1961). The name of the chairman changed from time to time with the full knowledge
B of Ahmad Roose, Sundram and all others concerned.

The FSA school was started by the group of three on 1 September 1978. FSB was incorporated on 18 December 1978. The minutes of 22 November 1978 describe the group of three as 'the pro-tem committee'. A committee acts as an agent for a principal. The expression 'pro-tem
C committee' in this context can only mean that they were to hold office temporarily for the period the company was in the process of formation and to hand it over to its official director when the company was validly constituted. The meeting agreed they be directors designate, to be formally appointed to the board of FSB, along with Sundram's wife Indrani ('the first petitioner') and five others. Mrs Hashimah Roose, the current principal,
D was to continue in that capacity in addition to being a non-voting director ex-officio. As to the prospect of the schools making ends meet, Sundram is recorded as having said on that day:

> Mr PS Sundram estimated on the operating costs of the schools and requested current parents to do their best to recruit more children into the
E schools. To achieve *break-even point* at current costs, a student population of 120 was required. But indications are that during the second term their target could be achieved if not exceeded. (Emphasis added.)

Assuming that each parent at this meeting had two children in FSA on 22 November 1978, that makes only 42 children. The reference to 'break-
F even point at current costs' can only mean one thing. Unless 120 students were taken in, there would be a cost overrun. The FSA school was therefore running at a loss on 22 November 1978.

Before we focus on the audited accounts to which Mokhtar Sidin JCA directed our attention, we need to keep in front of our minds that the
G working capital of FSB could only come from its share capital and loans, if any. The income could only be generated from the fees collected. The first audited accounts are from incorporation on 18 December 1978 to 31 August 1979. The auditors reported that upon incorporation, there was a deficit on schools running of RM7,779. A surplus of RM13,952 was added. It is a fair inference that this money could only have come from fees
H and deposits collected and paid into FSB's bank account with BBMB. Between 17 November 1978 when the amount paid in was RM8,956.50 and at 31 August 1979, the further fees and deposits collected and banked in must have taken the figure up to RM13,952. As to who was to own the schools' assets, Ahmad Roose's own words in his letter are crucial:

I > The beneficiary in all cases is the Fairview Schools Bhd.

The accounts of its first year of operation (ending 31 August 1979) show that only two subscriber's shares had been issued to Mrs Ahmad Roose and Mrs Sundram (ie Hashimah bte Abdul Aziz and Indrani a/p C Rajaratnam). In other words, the issued and paid-up share capital for its

first year was RM2 only. But the income and expenditure account shows that RM180,805 was collected from school fees and miscellaneous fees. The balance sheet shows parents' deposits of RM84,985. The fixed assets of FSB are shown in the notes on the accounts as standing at RM58,637, but depreciated to RM47,603 as at 31 August 1979. All this is shown as belonging not to the group of three but to FSB. Hashimah affirmed the statutory declaration on 17 September 1980 that these accounts were drawn up to give a true and fair view of the company and were correct.

Nowhere in these accounts is there any suggestion that the group of three had injected any tangible assets into the company. Nor was there anything to suggest that there was any liability whatsoever on the part of FSB as trustee to the group of three as beneficiaries for any asset whatsoever.

Thus far, it is self evident that the group of three were only three out of the 40 or more persons who influenced the gestation of FSB and conceived the idea of forming this company. As their pro-tem committee, the group of three took the necessary steps with the help of their legal advisors and the authorities to incorporate it. They set up the nucleus of the business FSB was to operate. As the minutes of 22 November 1978 show, upon incorporation, they intended to hand over control of FSB to its directors. In a word, the group of three were the chief 'promoters' of FSB in the classic sense that this term is understood in company law (see *Pennington's Company Law* (6th Ed) at p 523 et seq). By FSB's articles of association, directors were not required to be shareholders. Nonetheless, upon appointment, such directors would have assumed all the statutory liabilities imposed on company directors.

Promoters have a legal duty not to make any secret profit out of the promotion of the company without the company's consent and also to disclose to the company any interest the promoters have in any transaction proposed to be entered into by the company. *Palmer's Company Precedents* (17th Ed) Pt I et seq is authority for the proposition that if a promoter acquires any property for the inchoate company after the commencement of the promotion, he is presumed to do so as trustee of the company, 'so that he must hand it over to the company at the price he gave for it, unless he discloses not merely the profit he proposes to make but also informs the company of its right to call for the property at its cost price' (see *Gower's Modern Company Law* (4th Ed) at p 327) ('Gower').

At pp 332 and 333 of Gower is this passage:

> A promoter is not entitled to recover any remuneration for his services from the company unless there is a valid contract, enabling him to do so, between him and the company. Indeed, without such a contract he is not even entitled to recover his preliminary expenses: *Re English and Colonial Produce Co* [1906] 2 Ch 435, CA; or the registration fees and capital fees: *Re National Motor Mail Coach Co* [1908] 2 Ch 515, CA. In this respect the promoter is at the mercy of the directors of the company. Until the company is formed it cannot enter into valid contract: *Kelner v Baxter* (1866) LR 2 CP 174; *Natal Land Co v Pauline Syndicate* [1904] AC 120; it must enter into a new contract and this ought to be under seal since the consideration rendered by the promoter will be past; and the promoter therefore has to expend the money without any guarantee that he will be repaid. In practice, however,

recovery of preliminary expenses and registration fees does not normally present any difficulty. The articles will contain a provision authorizing the directors to pay them: Table A art 80; and although this does not constitute any contract between the company and the promoter as such — even if the articles provide that the expenses shall be paid, it seems that this will not constitute a contractual liability under s 20 on which the promoter, if he becomes a member, can sue, see above, pp 315–318 and (1971) 87 LQr 367 at pp 369–372 — it is sufficient authority to the directors to repay expenses properly incurred [see *Re Rotherham Alum Co* (1883) Ch D 103, CA; *Re Engelfield Colliery Co* (1877–1878) 8 Ch D 388, CA. The estimated amount of the expenses by whom they are payable must be disclosed in any prospectus (Sch 4, Pt I, para 12) or statement in lieu (Sch 3, Pt I and Sch 5, Pt I) and, *until written off, the actual amount paid or payable must be disclosed in the company's annual balance sheet* (Sch 8, Pt I, para 3). See also 1978 bill, cl 4(3)]. If, as is generally the case, the promoter is one of the directors, he can be reasonably confident that his expenses will be paid. (Emphasis added.)

The certificates tendered in evidence state that they have been issued under s 48 of the Education Act 1961. The registration of schools is covered by Pt V of the Education Act 1961. Section 44 makes the registration of all schools mandatory. Section 45 provides for the maintenance of the register in the prescribed form. Sections 46 and 47 read:

46 Application for registration

(1) An application for the registration of a schools or educational institution shall be made to the Registrar by the persons applying to be registered as managers or governors thereof or by the persons who will be responsible for the management thereof.

(2) Every application under sub-s (1) —

(a) shall be in such form as may be prescribed;

(b) shall be accompanied by applications for registration as a manager or governor of the schools or educational institution by every person named in the application under sub-s (1).

47 Restriction on registration

No schools or education institution shall be registered until —

(a) the persons making application for registration have appointed one of their number to be the chairman of the managers or governors for the purposes of this Act; and

(b) a certificate of the appointment, signed by those persons, has been furnished to the Registrar.

Then follows s 48 which reads:

Provisional certificates of registration

(1) On receipt of an application for registration of a school or educational institution under s 46 the Registrar may, in his discretion, pending investigation of the application, issue to the person who is to act as chairman of the managers or governors or to the person responsible for the management thereof a provisional certificate of registration in respect of such schools or institution.

(2) Provisional certificates of registration shall be issued in such form and subject to such conditions as may be prescribed. A

(3) A provisional certificate may at the discretion of the Registrar be revoked at any time by notice in writing under the hand of the Registrar served on the person to whom the certificate was issued.

The first application submitted prior to September 1978 has not been put in evidence. There is a presumption that all official acts have been regularly performed (see s 114(e) of the Evidence Act 1950). So it has to be inferred that the application submitted was in the prescribed form required and that as required by s 47 the applicants appointed Ahmad Roose to be the chairman of the proposed limited company Fairview Schools Association for the purposes of the Act. B C

The particulars contained in the certificates Nos 720, 721 and 722 could only have come from the particulars supplied by the applicants prior to incorporation or from the office bearers in FSB after incorporation in the case of all 'sijils' issued after 1 March 1979.

The sections of the Education Act 1961 above set out show that the certificate is issued not to an individual in his personal capacity but by virtue of his office, ie 'to the person who *is to* act as chairman of the managers or to the person responsible for the management of the schools'. D

In this context, it must be noted that s 19 of the Education Act in England is very differently worded (see 15 *Halsbury's Statutes* (4th Ed) p 124) which requires for the constitution of a body of governors and for a proportion of the governors to be foundation governors and the remainder to be appointed by the local education authority. E

Our Act leaves the applicants free to decide how they should constitute themselves and whom they wish to appoint chairman. They chose to form themselves into a limited company with a succession of different chairmen thereafter. F

Thus, Ahmad Roose was the first chairman from 1 September 1978 until 11 April 1983. On this date Dato' Ahmad Yunus became chairman. In 1984–1985 the chairman was Dr Umasuthan Kaloo. From 1986-1989 the chairman was KB Thuraisingham ('KBT'). From 13 March 1989 the chairman again became Ahmad Roose. On 26 February 1993, the registrar recorded Saw Teng Chuan as chairman, and as from 16 December 1993, the schools filed forms stating that KBT had taken over as chairman. These particulars are taken from Mr Sundram's statement in the court below. The petitioner's claim that Ahmad Roose was a 'chairman' for life of the schools has no basis in reality. G H

However, according to Pn Arpah's affidavit, the records of the Registrar of Schools shows the changes of chairmanship as follows:

1 September 1979 – 11 November 1980 — Tn Hj Ahmad Roose Hji Mohd Ali

13 December 1983 – 31 December 1988 — Dato' Ahmad Yunus I

1 January 1989 – 1 November 1990 — Tn Hj Ahmad Roose Hji Mohd Ali

1 January 1993 – 31 December 1994 — En John Saw Teng Chuan

19 May 1994 to present day — En KB Thuraisingham

A It is significant that the certificate numbers never changed. It is still 720, 721 and 722. The name is *not* Fairview Schools Association but Fairview Schools. Although the certificates as late as 1991 are headed Provisional Certificate of Registration under s 48, they contain all the relevant details required to be included by s 49. By the time the winding-up petition was filed on 25 August 1994, the registrar had already registered B Saw Teng Chuan as chairman from 1 January 1993. When the petition was heard in mid-1996, the High Court had evidence before it from the Ministry of Education that Ahmad Roose had ceased to be recorded as chairman on 31 December 1992.

Section 2 of the Education Act 1961 defines 'schools' as:

C

> (a) a place where ten or more persons are or are habitually taught whether in one or more classes and includes a kindergarten, nursery schools and a training centre for teachers in kindergarten and nursery schools; ...
>
> but does not include any place where the teaching is of purely religious character or for a purely religious purpose or where the Registrar is satisfied D that the teaching or instruction provided is not educational as envisaged in this Act; ... .

The relevant sections quoted make clear that the provisional certificate is not a document of title evidencing presumptive ownership of property, be it land or chattles real or personal. It merely records the fact that official E recognition has been taken of the place where the designated activity is to be conducted and identifies the person (the chairman) primarily responsible for ensuring that the designated activities are carried out in the manner prescribed by the Education Act 1961. Furthermore, by s 53 of this Act, the registration could be cancelled at anytime for the reasons stated therein.

F

One needs to be careful when asserting a claim to 'the ownership of the permit' (or the certificate) in such circumstances. The evidence establishes that the provisional certificates ('sijil sementara') were renewed each year terminating on 31 December. The renewal fee of RM2 was paid by FSB and the evidence of renewal is by way of a rubber stamp endorsed G on the certificate with the particulars filled in. The certificates were issued to the Fairview Schools. It is not the ownership of the paper on which these details appear which is in issue here. By claiming ownership of the permits, the group of three, and Ahmad Roose in particular, is saying that he owns the right to be issued this permit in his individual capacity, presumably for as long as he wished to run an educational institution H called Fairview Schools Association. In law, the concept of owners implies the right to use and enjoy property including the right to transmit it to others. But the renewal of the permit was an executive act, which cannot be the subject of a decree of specific performance (see s 29 of the Government Proceedings Ordinance 1956 and *Lim Kit Siang v United* I *Engineers (M) Bhd & Ors* [1988] 1 MLJ 35 at p 37).

There is ample evidence to support the view that it was the efforts of the group of three, their spouses and supporters which propelled the Fairview Schools to a viable educational institution. This was intended to

be and was always run as a non-profit making body. The efforts aforesaid may well have gone beyond the call of duty. The tenth anniversary of the schools was celebrated in 1989. The messages from the group of three who were respected as the schools' founders is testimony of their invaluable contributions to the growth of an institution which in microcosm, symbolised Malaysia at its radiant. The poem which accompanied the message of Mrs Rosie Low, the supervisor of the junior school, describes the spirit which then prevailed. It bears repetition here for posterity:

There is a gift I'd like to give you
That can't be bought or sold
A ray of sunshine across the waters
That comes straight from the soul.
Let us join our hands together
To bind the colours of our skin
A rainbow under God's great heaven
A sign that love will always win.

Ten (One) thousand million smiles
I bring to you across the miles
In my land of sunshine
Or in your land of snow
Makes no difference where you are
If you let your feelings show
Ten (one) thousand millions ways
To love each other every day
For the poet and the old man
For the mother and the child
These ten (one) thousand millions smiles.

If the world is full of sorrow
Then what's the meaning of life
If war's the master of the house
And hunger is his wife, o o
But a shining bridge of loving smiles
And tender helping hands
Will bind all men on earth together
And will forever stand.

So here I stand with heart in hand
I bring this gift from any homeland
So take these smiles and sweet hellos
Keep them in your heart where ever you may go.

By 31 August 1991, FSB's turnover was RM1,140,594. Its fixed assets were valued at RM1,159,338. Being an international school, the parents were of necessity a transient population. A total of 463 lots of 50 shares each had been issued, but about two thirds of the parent shareholders had left without a forwarding address. At some point, the practice of making the parents of incoming children shareholders as a matter of course was discontinued. However all parents had to make deposits by way of security for fees. Since, in theory these were refundable, the parents were shown in FSB's books as creditors.

During the earlier tenure of KBT's chairmanship from 1986 to 1989, FSB had bought a piece of land at Bukit Belacan comprised in Lot No 1223, Mukim of Ampang intending to put up its own school building. Thereafter, when Ahmad Roose became chairman once more, it was decided at an EGM of FSB on 19 August 1991 that this land was unsuitable for a school building and should be sold at a loss of about RM200,000 for RM520,000, and the funds used to buy another piece of land.

The schools were then being carried on in rented premises at 317 Jalan Ampang and the landlord had given notice of intention to terminate the tenancy. At another EGM on 18 December 1991, Ahmad Roose announced that owing to the need to expand and the huge capital costs involved, it was no longer possible to confine FSB's shareholdings on a non-profit basis but to consider the schools on a commercial basis with dividends being declared to the existing shareholders out of the profits of the company.

At this meeting, the following resolutions were unanimously adopted, viz:

(i) to increase the authorized capital of FSB from RM50,000 to RM5m;

(ii) to amend the M & A of FSB accordingly;

(iii) subject to the approval of the CIC and other authorities, to issue two million shares in FSB to the shareholders registered in FSB's books as at 20 November 1991 in the proportion of 86 new shares for each share held and shares not taken up be dealt with as the directors thought fit;

(iv) to issue shares to persons other than parents of children in FSB;

(v) and most importantly to purchase a 3.5 acre site at Bandar Wangsa Maju from PGK Sdn Bhd ('PGK') for RM2,332,638 and to obtain the necessary loan for the purpose.

On 18 March 1992, FSB entered into a formal written agreement to buy this land. The Datuk Bandar of Kuala Lumpur held a lease over the entire area of 27.28 acres for 99 years to be developed into a new township. PGK had been given the right to develop the said area of which 152,460 square feet ('the said lot') had been set aside for an educational institution. It is this lot which FSB bought at an agreed price of RM2,334,162, by paying 10% down payment on 18 March 1992 and agreeing to make further payments of 40% of the purchase price on completion of the earthworks, another 40% on completion of the infrastructure facilities and a final 10% on delivery of the transfer. For the present purposes, it is not necessary to set out all the provisions of this sale agreement. Suffice to say that to meet the down payment, Ahmad Roose and his board utilized the cash reserves of FSB which was then on fixed deposit. It is not clear what they did with the RM520,000 for the Bukit Belacan land, if they received full payment for it. What is clear is that Ahmad Roose and his board thought they could raise the balance required by loans from financial institutions. The first 40% or RM933,664.80 had to be paid by 31 March 1992. Failure meant

the vendor could forfeit the deposit and terminate the agreement. By the time of the EGM on 15 June 1992, FSB was facing a financial crisis because all measures to raise the loan had failed and consideration was therefore given to getting an extension for as long as possible and taking alternative measures to raise RM7.5m to build the new schools. A

Further alternatives were explored and placed for consideration before another EGM on 28 July 1992. The meeting unanimously authorized the board to proceed to negotiate a joint venture or loan with Bitaria Sdn Bhd or Datin May Lee and also resolved to increase the school fee refundable deposit to RM3,000 per child towards financing the cost of the construction of the new school. A comprehensive financial report dated 27 July 1992 had been circulated to all concerned about the implications of these proposals. The need for funds had become desperate because the deadline for avoiding forfeiture of FSB's deposit and the termination of the agreement with PGK was 31 July 1992. B C

That very day, the Ahmad Roose's board executed a formal loan agreement with Bitaria Sdn Bhd ('the said loan agreement'). Bitaria agreed to lend RM2,100,745.80 to FSB, to complete the purchase of the said lot. As security, FSB executed an absolute assignment of all its rights against PGK and the Datuk Bandar of Kuala Lumpur under the sale agreement. FSB undertook to complete its rights issue with a limited time, and Bitaria was given the option of either compelling repayment of its loan in cash, or to convert the whole or any part of its loan to shares in FSB provided in that event Bitaria was to hold not less than 30% of the entire share capital of FSB. Bitaria also had the option of taking up all shares allotted and not taken up by the shareholders of FSB. If this was less than 30% of FSB's share capital, then the FSB board was obliged to allot the entire shortfall to Bitaria. Bitaria borrowed their loan moneys from its bankers. As from 30 July 1992, FSB took upon itself a liability to repay the loan with interest at 2% over Bitaria's bank's rates of interest. FSB was the legal owner of the said lot but having assigned all its rights and also executed a charge in escrow, FSB agreed that its right to occupy the said lot would be as Bitaria's licensee only. D E F G

Obviously, the financial problems of FSB were a continuing nightmare because a further EGM was convened for 11 November 1992 when Ahmad Roose's board tabled a resolution that schools fees be increased by 30%. This was the only resolution tabled for that day.

Now art 66 of FSB's M & A provided that all business transacted at an EGM shall be deemed special. And art 61 required the notice given of any general meeting to state inter alia 'in case of special business the general nature of the business'. H

Once the meeting got under way and Ahmad Roose explained the need for the increase in the schools fees, KBT launched a vehement attack on the board for selling the Bukit Belacan land. KBT said that when KBT had left the board, this land had been put in a state of readiness for the new schools building including the financing thereof. The purchase of the Wangsa Maju land was also attacked as was the agreement with Bitaria. KBT's faction had not given any prior notice of their intention to discuss this or any other business. I

A After this onslaught, KBT moved a vote of no confidence in the incumbent board. This was supported by a majority voice vote. As Sundram says, the incumbent board were 'booed out'.

Had the chairman ruled that such a motion of no confidence was out of order since no advance notice had been given, its propriety would have B become an issue which required to be judicially decided (see Gower pp 532, 533 and *Re Hampshire Land Co* [1896] 2 Ch 743 referred at note 46).

But the matter became a non-issue because immediately after this, Ahmad Roose declared that, '... he quit the company and walked away. C The other directors left their seats or were reluctant to continue with the meeting ...' (see the minutes). The secretary agreed the meeting had not been adjourned. To continue with the meeting, KBT was nominated chairman. This was put to the vote. Forty-six voted in favour. Four abstained. Nobody voted against. Article 69 provides that the members present may choose one of themselves to be chairman if all the directors D present decline to take the chair. The main resolution regarding the increase in the school fees by 20% was put to the vote and carried out.

Dr Yahya Sofie had tendered his resignation as board member during the meeting. Article 91 provided for the directors to fill a casual vacancy. The minutes here read that the members present at this meeting E 'reappointed' Praba Menon and Dhaliwal as board directors. As can be seen from the petition, these two individuals were lawfully appointed directors and the term 're-appoint' can only mean that the meeting recognized that they were not the subject of the no confidence move. KBT vacated the chair which was then taken by Praba Menon. Eight persons F including John Saw were then contingently appointed to fill up further vacancies on the board should the other incumbents decide to retire.

Sundram's notice of his intention to withdraw the schools' licence was noted in the minutes.

The next board meeting of FSB was held on 17 November 1992. G Four directors of the board, as it was constituted on 11 November 1992 and lawfully there by virtue of their election at the previous AGM, were present, ie Praba Menon, JS Dhaliwal, R Thiagarajah and Dr Asraf Osman Kothawala. FSB's secretaries informed the board that between 11 and 17 November 1992, Ahmad Roose, Mohmad Kamar, Dr Yahya, Dato' Seng, Sivananthiran and Dr Malik had tendered their resignation. The H petitioners complain that no previous notice was given to the directors of this meeting. But the fact is that all the directors were there except Sundram, and those who resigned. Article 113(c) provides that a director vacates office upon resignation. Article 65 provides that non receipt of notice shall not invalidate any meeting. By art 88, unless otherwise I determined by a general meeting, the number of directors was not to exceed seven. The petitioners say that as on 10 November 1992, the number had been increased to 11 (the old board). Four of them were present. As empowered by art 91, they appointed six persons to succeed the six who had resigned. One of these was John Saw. Another was Daniel Chian Ngook For. According to the minutes, he said something which

resulted in all the four directors aforesaid of the old board resigning then and there. The result was that the six new appointees now took control and John Saw Teng Chuan (without any formal minute to that effect) assumed control as chairman of FSB. They are referred to hereafter as 'the new board'. Apparently, they felt that Mr Sundram should resign too.

That John Saw acted as chairman on 17 November with the acquiescence of the new board is clear because as from 18 November 1992 he signed the minutes as chairman. Mr Selva seems to have given way as secretary to Koh Tuck Kean. Sundram refused to vacate, and Sivananthiran's alleged resignation between 11 November 1992 and 17 November 1992 was repudiated. The new board gave notice on 10 February 1993 for an EGM to be held on 7 March 1993 at 3pm to remove them with immediate effect. The same day, the new board gave notice of the 13th AGM of FSB on 7 March 1993 at 4pm.

When the EGM was convened on 7 March 1993, Sundram and several others sought to challenge it on the ground that the requisite notice had not been given as required by law. They did not get a sympathetic hearing. Mr Saw who was in the chair overruled the objections. His attitude (and that of KBT who took an active part in the proceedings) was that once a vote of no confidence had been passed, every member of the old board must resign. There was then a dispute as to the validity of proxies. In the result, both Sundram and Sivananthiran were voted off the board by 1,250 votes for and 650 votes against. Article 96 of FSB's M & A and s 128 of the Act permits removal of directors by a simple majority. The AGM followed and John Saw and four others were re-elected as directors.

Ahmad Roose and the other members of the old board as on 17 November 1992 resigned of their own free will. Sundram and Sivananthiran, however, were removed. After his resignation, Ahmad Roose wrote to FSB by letter dated 16 December 1992 that the permits were his. The letter is written to the chairman of FSB, a post Ahmad Roose vacated. He claimed the permits were in the name of Fairview Schools Association. This is not correct. They were in the name 'Sekolah Fairview'. Ahmad Roose wanted FSB to effect the renewal at its own expense but in his name. FSB did renew the permits but in the name of John Saw as chairman from 1 January 1993 to 31 December 1994, such renewals being effected on 18 April 1994 and 24 May 1994.

Sivananthiran has not filed any action and we are not concerned with him. Not until 4 December 1993, ie nearly a year after the meeting on 17 November 1992 and nearly seven months after his expulsion as board member did Sundram file Civil Suit No S4–22–594–93 ('the civil suit'). He named FSB, KBT, the company secretary and all the other new directors of FSB as defendants. In his statement of claim, Sundram:

(i) attacked the validity of the appointment of the directors at the meeting of 17 November 1992;

(ii) attacked the validity of the EGM convened on 7 March 1993 because the meeting had not been called by a resolution of the board and had not given 28 days' notice;

(iii) claimed that he had not been given a fair opportunity to show cause why he should not have been removed; and

(iv) relied on various other alleged transgressions arising out of the alleged wilful refusal of the company's officers to make proper disclosures to his queries.

In brief, Sundram's prayer was for the meeting of 11 November 1992 and 7 March 1993 to be declared null and void, to be reinstated as the managing director of FSB and for the status quo to be restored. But declaratory relief is a discretionary remedy. The delays aforesaid were inimical to a speedy resolution. Perhaps the group of three felt they could enlist the aid of the relevant educational authorities to prevent the new board entrenching themselves. They now took some tentative steps to register themselves as Fairview Schools Association, which was not proceeded with.

A defence was filed in the civil suit in December 1993. KBT filed an affidavit in support of an attempt to have the suit struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). What happened to this application has not been made known to us. Since the civil suit was fixed for a full trial on 8 February 1995, we infer that this application was either dismissed or not proceeded with.

Whilst all this was going on, the new board endeavoured to disentangle FSB from the arrangements made with Bitaria by finding other business allies to help restructure FSB's future plans. On 20 November 1993, Bitaria formally demanded repayment of the loan of RM2,100,745.80 plus accrued interest of RM249,601.51. The new board approached the Bank of Commerce for a short term loan to pay off Bitaria. By March 1994, this loan had been approved in principle. In May 1994, KBT was reappointed to the new board as chairman. A battle of affidavits was then in progress in the civil suit. KBT filed an affidavit defending his actions at the meeting of 11 November 1992. He also sent a letter to all parents about the schools' finances. By 28 July 1994, the new board gave notice of an EGM on 28 August 1994 to remove David Kuok & Co as auditors, and another EGM to increase the share capital of FSB from RM23,150 to RM4,023,150. Other resolutions were proposed at this second EGM which had far reaching implications on the structure of FSB, the composition of its board and the terms of its M & A. The big picture was that these resolutions were required to raise the necessary money to pay off Bitaria and make FSB viable financially. Kolej Damansara Utama ('KDU') had been approached to take up the increased share capital required.

Had these proposals been put through, Bitaria and the group of three must have feared they would have been locked out of any further involvement with FSB. At this stage, it must be emphasized that Sundram is not a shareholder in FSB. Nor is Ahmad Roose. The third member of the group of three, Dr Malik, is a shareholder. This winding-up petition was filed on 25 August 1994 with the avowed object of thwarting the objects of the meetings on 28 August 1994. But the petitioners' solicitors did not serve the petition until about 9 September 1994. All the resolutions were passed with the required majority.

This is a contributors' petition in name only. The petitioners' solicitors are the same firm who are acting for Sundram in the civil suit. In so far as the complaints relate to the events which took place at the meetings on the 11 November 1992 and 7 March 1993, they were nearly two years late. Indeed Dr Malik and Dr Kothawala, the third and sixth petitioner, had resigned from the board by 17 November 1992. How can they now be heard to complain? The object of the exercise was however to detach the permits and the assets of FSB and vest them in the group of three whilst at the same time saddling all the liabilities of FSB on the new board of directors who took control of FSB on and after 17 November 1992. The petitioners applied for an interim injunction which was only withheld pending arguments because Mr Davidson gave an undertaking not to implement them. The injunction eventually was granted on 23 January 1995.

The petition had a catastrophic effect on FSB. The Bank of Commerce withdrew its offer of finance. All plans for expansions and resolving the financial problems of the schools had to be put on hold. After some further delays arising from appeals against interlocutory orders refusing leave to cross-examine the deponents of affidavits filed, the winding-up petition eventually came on for hearing on 9 March 1996 and various dates thereafter. Written submissions were filed and the High Court judge ordered the company to be wound up on 20 November 1996.

The civil suit is yet to be heard. In late 1995, the group of three filed Originating Motion No R1–25–9–95 in the High Court at Kuala Lumpur against the Chief Registrar of Schools and the Ministry of Education for a mandamus seeking the court's intervention to compel the authorities to invalidate the permits granted to the Fairview Schools under the chairmanship of John Saw and then KBT and to issue them to Ahmad Roose instead. Once again they were represented by the same firm of solicitors. This motion has been part heard. Both the civil suit and the motion have been adjourned pending the decision in this appeal.

One further point to note is a sharp divergence of views between Ahmad Roose and Sundram about the extent of their claims to ownership of FSB's assets. Having taken a prominent role in this petition by filing a very contentious affidavit deposed to on 20 January 1995, Ahmad Roose failed to appear at the hearing on 10 May 1996 for cross-examination. Despite an adjournment to 15 May 1996 specifically to procure his attendance, Ahmad Roose still did not turn up. By then, his writ of mandamus was pending in another court. For what it is worth, his affidavit contains, inter alia, the following averments:

> (i) I affirm that I was not a shareholder of the company by choice. Although all parents were required to become shareholders, I chose not to become one since my wife, Hashimah bte (Tun) Abdul Aziz (one of the petitioners) is not only a shareholder but also a subscriber to the articles and memorandum of association of the company. Further, she was also the first principal of the school. The necessity for me to become a shareholder thus did not arise.

(ii) As affirmed above, the schools and the respondent are separate entities. Consequently, the winding-up of the respondent cannot automatically result in the closure of the school as well. This is so because the permit to operate the school is not an 'asset' owned by the company. Thus, when the order to wind up the company is issued by the court, it does not follow that the court would ipso facto issue an order to close down the school. I verily believe the power to do so is vested in the Minister of Education alone. The court may, however, concomitantly chose to issue a separate order to Ahmad Roose as chairman of the association and his committee to take immediate steps to ensure that the school shall continue to function. In this connection, I do hereby affirm that I shall take all the relevant steps to ensure that the school shall continue to remain in operation when the respondent is ordered to be closed down.

(iii) The contention that 'the land and all the assets' (presumably together with all the liabilities) belonging to the company 'are returned to the founders' is not only absurd but also infantile. The petitioners are certainly not ignoramus of the Companies Act 1965 that they would care to a such an assumption.

(iv) One of the many contentions of the respondents' counsel is that the school's permit is not owned by Ahmad Roose or the committee.

This is not disputed because the Ministry of Education is the sole owner of the permit it granted to the association. Further, the Ministry is the only authority vested with the power not only to issue the permit but also to cancel, withdraw, transfer, change or modify the terms of the permit given to the association. Nevertheless, it is a fact that the Ministry has not exercised its power to transfer or cancel the permit issued to the association. Please see Appendix 'B' which was issued exactly ten years later after the original approval was given. Thus, it is clear that the permit was given to the association. Further, it may also be concluded that the question of whether or not the association was in existence or officially registered at the time (in 1978 or ten years later in 1988) was of no significance to the Ministry of Education.

Appendix 'B' is not made to Fairview Schools Association but to the chairman Fairview Schools and concern the maximum number of pupils permitted.

As pointed out earlier, after Ahmad Roose informed the Ministry that the name of Fairview Schools Association was not acceptable to the Registrar of Companies, the permits were issued not to Fairview Schools Association but 'Fairview Schools'. Ahmad Roose's claim in his affidavit aforesaid was only to the permit, and not to the assets and liabilities of FSB. Sundram however claimed in the court below that the group of three owned Fairview Schools and also owned the right to operate the schools (see the creditors' statement). He could not however produce any documentary evidence to show that the group of three had put any money into it. After repeatedly stating in cross-examination that he claimed ownership of all FSB's assets, the trial judge himself interceded with the question and Sundram gave the answer, recorded as follows:

Court: Is it your case, as explained yesterday on questioning by Mr Davidson, that the respondent are holding the assets of the

schools including the land, as trustee for you, Ahmad Roose and Dr Malik as beneficial owners? A

Sundram: Yes.

Before we turn to the other issues arising in this appeal, it would be in the best interests of all concerned to highlight the rejection by the trial judge of the petitioners' attempt to bolster their case by relying on the ground B that FSB was unable to pay its debts. Section 218(1)(e) of the Act was never pleaded or relied upon in the petition. The petition itself was never amended to rely upon this ground. None of the other 'creditors' had applied to support the petition except Sundram. His claim was disputed in the civil suit and therefore was not a debt FSB was legally liable to pay. We C entirely agree with the trial judge's observations for rejecting this ground (see [1977] 5 MLJ 267 at pp 279–280). There is no cross-appeal against this finding. The judge said at p 280:

> The only supporting creditor is PS Sundram and his debt is opposed. However, his motive seems to be to recover the schools for himself. Such a claim verges on absurdity. D

The trial judge later went to to decide that the assets of FSB including the permits belonged to the 'founder-members' of the school who were (or included in) the group of three. With respect, if Sundram's claim to the assets and the permits verged on absurdity, so should the claims of the so called 'founder-members'. There is a contradiction here which we are E unable to reconcile. The linchpin of the petitioners' case was that the permits, and the assets of the schools belonged to group of three. Even though Ahmad Roose was not named as a party to the petition, he nevertheless fully embroiled himself in these proceedings. This judgment must therefore be equally binding upon the group of three as much as the petitioners themselves; *Nana Offori Atta II & Anor v Nana Abu Bonsra II & Anor* [1957] 3 WLR 830 and *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 referred. In dismissing the claim to wind up under s 218(1)(e), the trial judge also took into account the wishes of the 57 shareholders and 98 creditors who opposed the petition. Sadly, he failed to take their views into account when dealing with the G other grounds on which he proceeded to order the winding-up.

Who owned the permits and the schools?

In his prologue to the petition (see [1997] 5 MLJ 272 at p 273), the trial judge overlooked the critical fact that the first application to the Ministry H was *not* made by the group of three in their individual capacity but as agents for the entire group of individuals who constituted the Parent-Teacher Association of the Garden School. Whilst the role of group of three as the prime movers of the new schools must be acknowledged, the facts we have earlier spelt out and the minutes of 22 November 1978 make it crystal clear that the group of three (or founders if they must be so I called) were not a power unto themselves but only a pro-tem committee on behalf of all the individuals who lent their support to the idea of forming the new company. The trial judge's finding that the purchase

value of the share was a refundable deposit is a misdirection in law and fact. Share capital cannot be refunded by the company to a shareholder to pay for shares returned. This is illegal (see art 8 of FSB's M & A and s 67 of the Companies Act 1965). The only way to achieve this is for the company to go through a restructuring exercise for reduction of capital (see Gower p 683, Pennington p 172 and s 64 of the Companies Act 1965). As the minutes of 22 November 1978 show, the deposit which was refundable was the deposit made as security for fees which was to go into a separate account. So far as the company called FSB was concerned, the trial judge overlooked the sequence of events which proved that the vehicle intended although initially called 'Fairview Schools Association' was not an association at all in the sense of a 'society' but a proposed public company limited by guarantee and hence Fairview Schools Bhd. We will come to the legal implications of the events on 11 November 1992, 7 March 1993 and 28 August 1994 later. Having narrated this history, the trial judge said this at p 275:

> It is my finding that the permit holders had never handed over the ownership of the permits to the respondent. The Ministry had required the schools to be run on a non-profit basis. The attempted conversion of the schools to a profit-earning business required the Ministry's approval and such approval if any no doubt can be obtained only by the permit holders. No such clearance had been shown to have been obtained.

With the greatest respect to the trial judge, we think this finding is unsupported by any judicial reasoning and also flies completely in the face of facts and the applicable law. In all the circumstances of this case, it is a misconception to talk about 'ownership' of the permits. The provisional certificates as earlier spelt out was the prerogative of the Ministry. They were issued not to any individual in his personal capacity but initially to the applicant, ie Fairview Schools Association (a company limited by guarantee) aka Fairview Schools Bhd as from 1 March 1979. The names of Ahmad Roose and the various other individuals who succeeded him were not inserted in the licence to show ownership but to indicate the identity of the person who by virtue of his office as 'pengerusi' was charged with the responsibility of carrying out the requirements of the Education Act 1961. A careful reading of the correspondence which led to the issue of the 'sijils' and the 'sijils' themselves will show that it was the applicants who had mooted the idea of running the schools on a non-profit basis as a reason why their application should be considered. Nowhere in the Ministry's letter or in the 'sijils' was a *condition* imposed that the schools should not make a profit. This was an obligation which had been voluntarily assumed by all the persons who were concerned in promoting this company and running it after it was incorporated.

In holding that Fairview Schools Bhd was a domestic company, the trial judge once again misdirected himself by holding that there was a restriction on the transfer of shares. With respect, arts 26 to 38 of the M & A place no such restriction. Article 30 provided that the directors could in their discretion refuse to register any transfer without assigning any reason therefore. FSB is a public company and such restrictions will

be very jealously regarded by the courts (Pennington at p 342 and Gower at p 445). Whatever was discussed at the meeting of 22 November 1978 was superseded by the M & A of FSB. We are therefore unable to attach any esoteric significance in describing FSB as a 'domestic company'. A

However the trial judge, again with the greatest respect, made another leap in judicial reasoning by holding that because this was a domestic company its shareholders had no right to the assets of FSB but only to participate in overseeing and managing the schools. He said (at pp 275H–276E): B

> *Respondent, a domestic company*
>
> In the light of the background facts, it is my finding that the respondent cannot therefore be viewed as an ordinary company. I hold that it is a domestic company with restriction on the transfer of shares and the share capital is treated as a refundable deposit to the shareholders on demand at the par value of RM50 only, upon their children ceasing to be educated at the schools regardless of the value to the schools' assets. C
>
> The shareholding of RM50 merely entitles the parent shareholder to participate in overseeing the affairs of the schools, which were and have always been run by a principal, and teachers registered with the Ministry of Education. It is my judgment that for all intents and purposes, there remains a clear distinction between overseeing the management of the schools and ownership of their certificates of registration which gives right to operate the schools, and the assets. Since its inception, the respondent did not at all inject any funds towards the operational costs of the schools. The assets of the schools, including any accretion thereto, were the result of the initial investment by the founder members. D E
>
> *Respondent, a trustee*
>
> I find that the respondent, as the overseer, was entrusted, inter alia, with the management of the schools' funds and all other assets and all accounts were made up in its name. It is my finding that the respondent therefore stands in law in the position of a trustee vis-a-vis, the founder members. It is a fact that neither the certificates of registration nor the assets of the schools were ever transferred by the founders to the respondent for any consideration whatsoever. It is also a fact neither Ahmad Roose nor any other holder of the certificate ever applied to the Ministry of Education to effect a change of name in the certificates of registration from himself to the respondent. F G

The trial judge thus totally overlooked the significance of Ahmad Roose's letter to the Ministry dated 1 March 1979. He also failed to appreciate that FSB's only assets came from the money put into this company by its shareholders as capital and by the parents as fees and refundable deposits. So far as the group of three are concerned, their efforts prior to incorporation is shown in the audited accounts as a deficit. The trial judge's observation that FSB did not inject any funds into the operational costs of the schools suggests a lapse in memory of the basic principles of company law. Earlier in this judgment, we have already spelt out the legal role of promoters as trustees of all assets and rights they acquire for the company in the course of formation. Now let it be categorically stated that everything that is put into a company's name upon incorporation belongs to the company and to the company alone in the absence of reservation in the clearesr terms in the H I

M & A or in a formal contract executed after incorporation with the full knowledge and consent of *all* the shareholders. In all the circumstances of this case, the finding that FSB was a trustee for the founder members cannot stand scrutiny. We are not sure whether by 'founder members' the trial judge had in mind the group of three or all the people who participated in the meeting of 22 November 1978. The drift of his judgment suggests that he meant the group of three only, at least when talking of the permits. When it came to all the assets, there is a possibiliity that he had in mind everybody who made payments for shares and deposits at or about the time of incorporation. Far from FSB being a trustee for this amorphous class of beneficiaries, we hold that the reverse is the case in so far as those who promoted FSB were trustees for the company which in this case became the sole beneficiary of all its assets.

Indeed the contemporaneous available documentation in this case conclusively shows that this was also the intention of the group of three. Limited companies are formed so that its shareholders are not exposed to unlimited liability for the company's debts. In exchange for this immunity, share capital is pumped into the company which thus becomes available to the company's creditors. We have Ahmad Roose's written words to the bank in 1978 that FSB was the beneficiary of the moneys put into its account, not as the agent or trustee of the group of three. The trial judge's observation that the founders did not transfer the assets of the schools to FSB for any consideration whatsoever is incomprehensible. Shares were issued, and security deposits were taken on condition that they be refunded. If the group of three thought the assets of FSB belonged to them and the parent shareholders had no rights at all, there would have been no need to hold company meetings to obtain their sanction to deal with the assets in the company's books. The major decisions were the sale of the Bukit Belacan land and the purchase of the land at Wangsa Maju. The board paper of 27 July 1992 is a very telling document. It shows that the group of three and everybody else for that matter was under no illusion that FSB owned its assets in its own right. This passage taken from that report is significant:

> The board willingly accepted the responsibility of finding such large amount of capital estimated at RM5,750,000 as it was convinced that *with its own school the future of FSB is assured* considering that the school would be fully furnished, fully equipped with essentials teaching aids, the equipments for the three laboratories, a music room, a large hall, two libraries, audio visual rooms, etc. The cost also include professional fees and all other charges.

Very formal contracts were executed by FSB with PGK and then with Bitaria in which there are recitals that the land was to be purchased with FSB's assets and the beneficial ownership was also FSB. The Bukit Belacan land and the Wangsa Maju land were the biggest assets of FSB. It was not even hinted at the time, that the group of three had any claim to them. The trial judge's reliance on *Re Vandervell's Trusts* [1974] 1 All ER 47 was thus totally misplaced. It does not seem to have occurred to the trial judge that if in fact FSB was only an agent on trustee for the group of three in contracting with PGK and Bitaria, FSB may well have had no contractual rights to sue or be sued on those contracts by virtue of s 183 of the

Contracts Act 1950. It is hard to believe that the group of three even dreamed that the financial obligation to pay PGK or repay the loan to Bitaria was their personal liability, and Bitaria could now sue them for the loan.

The first time Ahmad Roose claimed proprietorship of the schools' permit was on 16 December 1992. Sundram did not claim ownership of the schools and its assets in his statement of claim in his civil suit. In para 2 of his statement of claim, he merely said:

> At all material times, the first defendant was formed to oversee the management of the school on behalf of the Fairview Schools Association ('the association') who is the permit-holder thereof.

The defence to this reads:

> Save and except that the said defendants admit that the first defendant was formed to oversee the management of the school, para 2 of the statement of claim is denied.

Sundram's claim that FSA was the permit holder or that FSB was formed to oversee the management *on behalf of FSA* was put in issue from the very outset of this litigation.

Having held that FSB was only a trustee of all its assets, the trial judge went further to hold that for FSB to claim it was a beneficial owner would nullify the restriction on the transfer of shares and also amount to a fraud on those shareholders who had redeemed their shares at RM50. Once again it is very difficult to understand this reasoning which is not only speculative but based on unsound premises. As at 31 January 1997, the accrued interest claimed by Bitaria was RM848,636.27, making a total debt of RM2,949,382.07. This debt to Bitaria was the creation of the Ahmad Roose board and the estimate of the market value of the Wangsa Maju land was pure speculation. Having purportedly vested FSB's assets in the founder members, the trial judge appears to have left these liabilities out of his calculations without giving any reason for doing so.

Winding-up under s 218(1)(f)

KBT was the prime mover in the purchase of the Bukit Belacan land. He said that when he left the board all the necessary arrangements had been in place to put the new school building on that site. This included finance.

By 11 November 1992, what Ahmad Roose and his board had done was to abort the project to build a school there and sell the Bukit Belacan land at a loss of RM200,000. It had also used up almost the entire cash reserves of FSB to pay for the deposit for the Wangsa Maju land and committed itself to pay the balance of over RM2m within a stipulated time without having the necessary funds in hand. Bitaria literally had to bail out FSB by the skin of its teeth.

Obviously, there was a lot of hostility on the part of KBT and his supporters to the actions of Ahmad Roose and his supporters whose voluntary resignations from the board tell their own story. The challenge facing the new board was essentially the same as the one facing the old —

how to raise enough capital to pay off Bitaria and build the school on the Wangsa Maju land.

The trial judge has spelt out the various acts of the new board up to 28 August 1994. We do not need to go over this ground again. The crucial question was this: Did KBT and the other directors on the new board act in their own personal interest or did *they* act in a manner they thought was for the benefit of FSB and its shareholders?

In this context, there is not a shred of evidence that KBT or any member of the new board made any secret profit or stood to make any personal gain by going into an arrangement with KDU.

As Mr Davidson was at pains to observe that he did not hold any brief for KBT. He was acting for the company. Serious differences of opinion between two groups of shareholders about how a crisis facing the company should be resolved may be the source of litigation between them. It should not by itself be a ground for winding up the company! Even if the appointments of some or all the directors of the new board was allegedly defective, the trial judge should have given due weight to art 119 of FSB which directs all such acts be valid if done bona fide.

This was a contributors' petition. As against the six petitioners and Sundram, there were 57 shareholders and 98 creditors who were opposed to the petition. They did not think the new board had acted in their own personal interest. They thought the new board acted bona fide. In any event, they did not want the company wound up. There was a serious misdirection on the part of the trial judge when he totally failed to take their views into account under this head or the just and equitable ground. Besides, he should have taken note that as the resolutions passed on 28 August 1994 were special resolutions, these proposals must have had the support of at least 75% of the shareholders present and voting. The petitioners' case under s 218(1)(f) of the Act was thus a non-starter.

Winding-up under s 218(1)(i) of the Companies Act 1965 — 'Just and Equitable'

The trial judge held the new board's 'agitprop' was that if FSB was wound up, the schools would close down. 'Agitprop' according to the *Concise Oxford Dictionary* means the dissemination of communist political propaganda. The use of the word here is puzzling. The finding that FSB alone was the beneficial owner of all its assets must negative any suggestion that there was a quasi partnership relation in existence here. The shares issued were in no sense a refundable deposit for reasons already explained. The reliance on *Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492 and in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 was therefore misplaced. Those cases concern situations in private companies where the shareholders stand in relation towards each other in the same way as partners do who get into a deadlock in the administration of the firm's affairs. In the present case, FSB was the sole owner of all the company's assets and there was no express or implied partnership between the group of three and the other parent shareholders before incorporation or

afterwards. All FSB resolutions were passed with the majority of votes prescribed by the M & A and the Companies Act 1965. There is therefore no analogy between this case and the two quasi-partnership decisions aforesaid. A court cannot in pursuit of what it considers 'fair' ignore the agreements between the parties. These are reflected in the documentary evidence and the M & A of FSB. Warner J made this point in *Re JE Cade & Son Ltd* [1992] BCLC 213 at p 227 where he said:

> Mr Collins submitted that that 'reversed the thrust' of earlier cases such as *Re A company (No 004377 of 1986)* [1987] BCLC 94, [1987] 1 WLR 102 (sometimes known as *Re XYZ Ltd*) and *Re Castleburn Ltd* [1991] BCLC 89 showed that in this field there was no sanctity of contract and that the court could in the pursuit of fairness ignore any agreement between the parties.
>
> I do not think that Balcombe LJ was intending to lay down any such wide proposition. What he said in the last passage that I have read was based on the fact that in [*Ebrahimi v Westbourne Galleries Ltd & Ors* [1972] 2 All ER 492], the House of Lords had held that, on a petition for winding up on the just and equitable ground, equitable considerations might override the legal rights and obligations conferred or imposed on the shareholders by the constitutions of the company, including of course, its articles. Balcombe LJ did not say, and cannot be taken to have meant to say, that, where such equitable considerations arise from agreements or understanding between the shareholders dehors the constitution of the company, the court is free to superimpose on the rights, expectations and obligations springing from those agreements or understandings further rights and obligations arising from its own concept of fairness. There can in my judgment be no such third tier of rights and obligations. The court, exercising its jurisdiction to wind up a company on the just and equitable ground or the jurisdiction conferred on it by ss 459 and 461 [of the English Companies Act 1985], has a very wide discretion, but it does not sit under a palm tree.

The trial judge was very critical of the conduct of KBT's faction on 11 and 17 of November 1992 and again 7 March 1993. These matters were already the subject matter of the civil suit in which Sundram was the *lone* complainant. When the trial judge took into account the matters scheduled for EGM on 28 August 1994 to decide whether it was just and equitable to wind-up, he was influenced by his assumptions:

(i) that the schools and its assets belong to the founder members;

(ii) that the sole reason for FSB's existence was that it should oversee and manage the property of its owners (ie the group of three and the founder members);

(iii) that by organizing a sale of the school and its assets to KDU, the new board was in effect bringing to an end the objective and purpose of FSB's existence; and

(iv) that the new board had an equitable obligation not to bring about such a situation.

Enough has been said to show that the correct view and the only view possible on the issue of ownership was that FSB owned all the assets in its name and correspondingly was saddled with all its liabilities from the salaries to be paid up to the teachers right up to the enormous loan and

A interest to Bitaria which was now hanging over its head like the veritable sword of Damocles. In exploring ways and means of preserving the company as a going concern, the new board far from terminating the company's prime objective, was seeking to perpetuate its existence. In such a context, it would be salutary to remember that 'a school' is only a location. The corporate personality of FSB consisted of the human and material resources involved, and to keep the classes and teachers going with a roof over their heads, millions of Ringgit had to be found.

In delving into the events connected with the meetings on 28 August 1994, there were further misdirections in the court below both as to facts and law. On 28 July 1994, the secretaries issued notice of an EGM on 28 August 1994 at 1 pm. This was for the proposed removal of the auditors. On 2 August 1994, the secretaries issued another notice for an EGM, also 28 August 1994 but at 1.30 pm. This was for the increase in the share capital and amendment of the articles of association. Also on 2 August 1994, the secretaries issued the notice for the AGM at 4.30 pm on 28 August 1994.

Article 60 of FSB's articles of association required 21 days notice at the least for an AGM and any meeting called to pass a special resolution. The first petitioner's letter is dated 15 August 1994. Even assuming it was posted on that day (there is no proof of any posting at all), it was too late for the secretary to include it for discussion 13 days later. The second letter by Mohd Kamar bin Mohamad also dealt with the election of directors and some new business. Being dated 18 August, it was also too late to be tabled for 28 August 1994. Mohd Kamar is not a party and did not appear to oppose the petition.

It seems to have escaped the trial judge's attention that even though this petition is dated 25 August 1994, it was only served together with an application for an injunction on FSB on 9 September 1994 *after* the meetings had taken place. As earlier observed, the special resolutions must have been passed with the requisite three quarter majority.

There are no official minutes of the meetings on 28 August 1994 in the appeal record. The effect of the service of the petition may have something to do with this. It must follow that the trial judge's account of what transpired at the meetings on 28 August 1994 must have been extracted from the affidavits filed on the one hand by Mahalingam for the petitioners and on the other the respondents' directors, and secretary. Sundram did not file any affidavit. The other petitioners did not file any affidavits. But Mahalingam did not attend the meetings. He gave a proxy to one Mdm Inake Roskam to attend on his behalf. His evidence is pure hearsay. She has not filed any affidavit. Since this was a case of oath against oath, the trial judge's unequitable acceptance of Mahalingam's accusations that KBT conducted this meeting with sinister motives is very hard to comprehend.

Earlier in his judgment, the trial judge had referred to the EGM to amend the articles of association and increase the share capital of FSB and to appoint a board of governors. He said that the board had achieved the passage of these resolutions by misleading the shareholders into believing

that if the 'amended resolutions' were not passed, the schools would have to be closed in September 1994. He then went on to find that KBT's insistence on compliance with s 149(1)(b) of the Act was done in the directors' own interests because in the interests of fair play, the meetings should have been postponed. In any case, the trial judge held that s 149(1)(b) of the Act did not invalidate a proxy which did not comply with s 149(1)(b) and that the failure to adjourn the meeting of 28 August 1994 and 'the denial of the proxy votes was an overall plan to pass the resolutions and thereby dispose of the properties'.

These complaints were not made in the petition. By going into matters which are not pleaded, issues become confused and a court can easily be misled into treating bare allegations as constituting evidence which could support an exercise in fact finding. That is one of the reasons for the time honoured rule set out in 7 *Halsbury's Laws of England* (4th Ed) p 607, *Supreme Court Practice* (1985) Note 20/3–4/1 at p 33, *Mallal's Supreme Court Practice* Note 20/3/1 at p 248 and *Sio Koon Lin v SB Mehra* [1981] 1 MLJ 225. The failure to plead these complaints could not be made good by affidavit evidence: *United Malayan Banking Corp v Palm & Vegetable Oils* [1983] 1 MLJ 206 at p 207.

What is more astonishing is that the petitioners did not make their complaints in the prescribed manner at the meetings of 28 August 1994. If they wanted an adjournment, it was up to them to make a formal proposal so that a vote could be taken, and if carried to the meeting would have had to be adjourned. By art 70, the chairman could only adjourn the meeting with the consent of the meeting and had to do so if directed by the meeting. It does not lie in the mouth of a court to say that KBT should have adjourned the meeting because the court thought it was a fair thing to do.

Turning now to the alleged failure of the secretary to reply to the belated letters of Indrani and Kamal, the proper response was that these letters were irrelevant. By art 97(2), FSB could appoint any person to be a director either to fill a casual vacancy or as an additional director. According to the petition para 5, there were places for 11 directors on the board. The notice for 28 August 1994 only covered six places. If any shareholder wished to propose more they could have done so by giving due notice. They could even requisite a meeting if the board refused to convene one (see art 58 and s 144 of the Act).

With the greatest respect to the trial judge we cannot agree that an illegal practice can become legal by usage. Section 149(1)(b) of the Act means what it says and must be complied with. If on previous occasions the shareholders were breaking the law out of ignorance that does not mean that they could continue to do so with impunity. So also the need for Dr Gurcharan Singh and En Hamid to comply with s 123(4) of the Act which clearly stipulates that the statutory declaration '*shall*' be lodged '*before*' he is appointed. The trial judge found that these two persons were tricked out of an opportunity to stand for election. But neither of these gentlemen supported the petition nor complained about being required to comply with the law. The Act provides for penalties in the case of non-

A compliance. It was not right for the trial judge to hold that it is just and equitable to penalize FSB because KBT did precisely what the law required him to do. We can see no evidence to suggest that he acted on that day out of any oblique motives. There is no evidence he benefited personally in any way. The resolutions tabled for decision at the meetings held on
B 28 August 1994 must have been passed by the requisite three quarter majority of the persons attending and voting. If the trial judge thought they were under any under illusions as to what they were voting for on that day, it is hard to understand why he should have continued to think in the same way when he gave judgment in November 1996 because by then they had solicitors and learned counsel representing them. When they came to
C court and opposed the petition, they knew full well what was at stake.

Motive

Powerful authorities were cited to us to show that even if it could be held
D in law that the permits and the assets of FSB belonged to the group of three, nevertheless, the court must dismiss the petition since it had been shown that the purpose of the petition was for the 'owners' to take the assets back for their own benefit and not for the benefit of the shareholders of the company as a whole.

E Sundram's role in this petition is as an alleged creditor. Actually, he is claiming ownership, as is Ahmad Roose. The way the case has been fought leads to the irresistible inference that the six petitioners with Mahalingam foremost are really fighting not so much for themselves but for the group of three to whom they say the permits and FSB's assets belong. A contributory's petition is a class action and must be brought on
F behalf of all the shareholders but these six are at war with all the other shareholders.

Re Chesterfield Catering Co Ltd [1976] 3 WLR 879 is the best case to show that the court will not allow such petitioners to succeed. For the record we have also noted *Pennington's Company Law* (5th Ed) p 854, *Re*
G *a Company* [1983] BCLC 492 and the Malaysian cases of *Re Sin Lee Sang Sawmill Sdn Bhd* [1990] 1 MLJ 250 and *Re Lo Siong Fong* [1994] 2 MLJ 72.

Having found that the permit holder is not the group of three but FSB company, and that FSB is not a trustee but the beneficial owner of all its assets we do not need to analyse these decisions in any detail.

H Where outsiders are claiming that property registered in the name of a limited company is theirs, the proper route is to file a civil suit in detinue or conversion or even a declaration that the property is being held by the company in trust for the claimant. To utilize a few minority shareholders as willing Trojan ponies to destroy the corporate edifice through a winding-up petition is a misuse of the court's process.

I Suffice to say therefore that in so far as the petitioners have lent their assistance in filing this petition, they did so for an improper purpose and the petition should have been dismissed on that ground.

Again where two groups of shareholders are at war with each other on matters of company policy, the proper way to resolve such disputes is by the democratic process of the majority vote. The Companies Act 1965 and the M & A of FSB contained inherent safeguards to achieve this. If the majority did not like what happened on 11 and 17 November 1992, they could have requisitioned a new meeting and voted the new board out. Significantly R Thiagarajah, a director, on 11 November 1992, resigned before 17 March 1993. He has not appeared to support the petition. Dr Malik, the third petitioner, and Asraf Othman Kothawala, the seventh petitioner, also resigned by 17 November 1992. The resolutions of 7 March 1993 were passed by a majority of 1,250 votes for and 650 votes against. So 1,900 votes were cast. Not until 3 August 1994 did Thiagarajah and Kothawala write to complain about the meeting of 17 November 1992. The crux of the matter is that this is a fight between six shareholders against the rest so that the company's assets can be taken away and effectively given to three persons of whom two are not even shareholders of the company. One of them, Ahmad Roose, even chose to absent himself from the cross-examination and should have forfeited any further claim for consideration.

Multiplicity of proceedings

The trial judge held that this contention was rejected once by Abdul Malek Ahmad J (as he then was) in this same winding-up petition and once by Rahmah Hussain JC (as she then was) in the civil suit. This finding must be based on a passage in the written submission of counsel for the petitioners which reads:

> Mr PS Sundram is made a bogeyman in these proceedings which is equated with his civil suit and it is suggested that this constitute multiplicity of proceedings. This argument was rejected twice — in this winding-up court by Abdul Malek Ahmad J (as he then was) and in the civil court by Rahmah Hussain JC (as she then was).

Mr Davidson submitted to us that the multiplicity issue never came up before Abdul Malek Ahmad J or Rahmah Hussain JC ever. We gave counsel for the petitioners ample time to respond by putting in a written submission in which we found nothing to support his earlier assertion aforesaid to the trial judge.

What the notes of evidence indicate is that on 23 January 1995, Low Hop Bing J dismissed an application by FSB to strike out this winding-up petition. The civil suit had then been fixed for hearing on 8 February 1995. This winding-up petition came up for hearing on 24 January 1995. Encik Yusof Khan made an oral application for leave to cross-examine. It was resisted. Abdul Malek Ahmad J adjourned it to 7 February 1995 for decision and fixed 23 February 1995. He dismissed the application for cross-examination on 7 February 1995. In the interim, the petitioners appealed. On 23 February 1995, En Yusof Khan successfully applied to stay the winding-up proceedings pending his appeal and postpone the petition until the appeal was disposed of.

How Rahmah Hussain JC figures in this issue, if she did at all, has not been clarified at all by the petitioners' counsel.

As far as the court is concerned it would appear to be a salutary practice to insist in future that counsel produce a certified copy of the order if res judicata is being relied upon. The res was wide open here. On the material before us, it has to be held that the the objection on the ground of multiplicity was well taken and the trial judge should have ruled in favour of FSB on this issue also.

There are other ramifications which arise out of this because:

(i) the 'ownership' of the permits;

(ii) the 'ownership' of the assets of FSB; and

(iii) the alleged illegality of the meetings on 11 and 17 November 1992, 7 March 1993 and 28 August 1994,

were all common questions of law and fact in all three proceedings. The real contest here is between the group of three on the one side and FSB and the educational authorities on the other. To the extent that the group of three have fully embroiled themselves in the proceeding before us, it must be held that issue estoppel will now apply to each of them on all matters which have been decided in this appeal.

The stand of the Official Receiver ('OR')

The infirmities of the trial judge's findings were exposed to the full light of day when the time came to enforce his orders.

On 27 November 1996, when FSB sought to obtain a stay of the winding-up order, the trial judge refused but went on to say:

> I direct the OR to forthwith take over and issue all necessary cheques inclusive of payments and other outgoings of each month that has to be met. In this, the OR will be guided by the headmistress or authorized representative appointed by the headmistress.

In other words, the schools were to be kept running for the benefit of its so called 'owners' whilst the company was to be wound up. Encouraged by this, Sundram has filed claims far in excess of what is stated in his civil suit. These are claims by way of unliquidated damages for alleged wrongful dismissal. Bitaria in the meantime appears to have lost its lending licence but is the assignee of the Wangsa Maju land. As at 31 January 1997, Bitaria is owed RM2,100,745.80 as principal and RM848,636.27 interest.

The OR is very perplexed by the trial judge's orders and has posed the following questions to this court:

(i) If all the assets of FSB belong to the group of three, who is to settle the company's liabilities?

(ii) Why was the OR required to run the schools if the assets belonged to the group of three and the so called founder members? The role of the OR has never been to run the business of third parties as a going concern so that they could come and take it over at some indefinite time.

The OR submits that if FSB is to be wound up, the only consequential order the High Court could have made was that the schools (ie the business) should be brought to an immediate halt and all the assets gathered in and the creditors paid off. A

The OR further submits to this court that if it is held that the assets belong to FSB there is every reason why it should not be wound up but should be permitted to continue because it appears to be functioning very well. B

This was a petition under s 218 of the Act. It was emphatically not a petition for relief on oppression under s 181 of the Act. Mr Davidson cited *See Teow Guan & Ors* v *Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 to the trial judge and in particular, the passage at p 604 by Gopal Sri Ram JCA which clearly states the only final order under s 221(1) of the Act is to direct a winding-up or dismiss the petition. The power to deal with the assets of the company is vested in the liquidator and not the court. The court's attempts to preserve the assets and the schools as a going concern so that it could be handed over to the group of three was therefore completely misconceived. C D

Regardless of the merits, the trial judge's orders for the costs of the petition to be paid by the directors who took over the board on 11 November 1993 were also misconceived. Courts should not make orders against persons who are not parties to the proceedings and who have not been heard why such orders should be made against them. It is not understood why if this order had any validity it would require a fresh action to be filed to recover such costs and what the cause of action in the fresh suit was going to be. E F

Conclusion

It follows from all this that the only order open is that this appeal is allowed and all the orders appealed against are set aside. The appellant's deposit by way of security for costs must be refunded.

The appellant must be paid its costs both here and in the court below. The appellant's solicitors are released from the undertaking they gave by way of security for the costs of this appeal. G

In view of the complexity of this case, we grant the appellant only a certificate for two counsel here and in the court below as required by O 59 r 19 of the RHC. H

For the avoidance of doubt, it is here stated that the six petitioners and Sundram shall be jointly and severally liable for all the taxed costs ordered.

The six petitioners and Sundram shall also pay: I

(i) the taxed costs of the OR here and in the court below and any costs thrown away in the winding-up proceedings which must now been aborted; and

(ii) the taxed costs only in the court below of the contributors and creditors who opposed the petition. In this court, they were not parties as such and we heard Raja Aziz as amicus curiae only. There will therefore be no order for any costs they have incurred in this appeal.

Epilogue

In the court below, written submissions were put in by all parties by June 1996. Judgment was delivered on 20 November 1996. It is unfortunate that nobody appears to have noticed the judgment of this court in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd* [1996] 1 MLJ 661. In addition to what was said in *Re JE Cade & Sons Ltd* [1992] BCLC 213 about the court not sitting 'under a palm tree', our analysis of the entire line of cases following *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at pp 684–692 should have amply demonstrated the futility of the claims made by the petitioners and Sundram about the alleged ownership of the permits and the assets of FSB in the absence of the clearest stipulation to that effect in the articles of association of FSB or enforceable contracts made by FSB after its incorporation and with the knowledge of all its shareholders. *Re Blue Arrow plc* [1987] BCLC 585 was especially instructive because it concerns the founder of a company who was removed from her position as president when the company went public.

The dead end at which these protagonists have arrived should at the very least make them now realize that the adversarial system has serious limitations when it comes to long term solutions for dispute resolution. An overview of the causes and consequences of the present debacle may yet go some way in compelling them to reconsider how best to rehabilitate the company. For:

> If the world is full of sorrow
> When what's the meaning of life
> If war's the master of the house
> And hunger is his wife, o o

We think it is a fair inference that the Bukit Belacan land was KBT's pet project. Its disposal at a loss of RM200,000, an inadequate explanation of how the RM520,000 realized from its sale was subsequently utilized, the commitment to buy the Wangsa Maju land for over RM2m without any clear ideas as to how to finance the project, and the desperate measures which were resorted to at the last minute by putting FSB at the mercy of Bitaria may all have been good grounds for criticisms of the Ahmad Roose board.

But nothing we have said in this judgment should be construed as meaning that this court wishes to encourage the kind of behaviour of KBT's faction on 11 November 1992 which led to the resignation en masse of Ahmad Roose and almost all members of his board.

The KBT's faction forgot that the Ahmad Roose board had acted with the approval of the previous EGMs, and in good faith. Nobody has

suggested that they had personally benefited from the transactions. Viewed through 1992 spectacles, the acts complained of may only have been an error of judgment. Worst of all the KBT's faction chose confrontation to consultation. The mutual hostility of the warring parties, for reasons not fully revealed and their entrenched positions have brought FSB into the morass in which it now is.

With all due deference to the trial judge, we feel that his distaste of the manner in which the KBT's faction conducted itself, and the Ahmad Roose faction overreacted, contributed in no small measure to the errors of law and fact which crept into his judgment. How much more promising these last five years might have been if they had only remembered a fundamental tenet of the Malaysian way of life:

> Kalau ada jarum yang patah
> Jangan disimpan di dalam peti
> Kalau ada silap dan salah
> Jangan disimpan di dalam hati.

We are satisfied that FSB would not have got to where it was by 1992 without the efforts of the Ahmad Roose, PS Sundram and Dr Malik, their spouses and their collaborators. It is indeed a pity that the rude denial of their deserving claims for recognition was allowed to degenerate into a battle for control of the company.

It is with regret that we have made orders for costs against the petitioners and Sundram personally. However, the adversarial system has its rules and costs must abide the event. It is not right that FSB should be visited with the burden of financing this litigation. The injunction made by Low Hop Bing J in the court below on 23 January 1995 must go but there will be no order to inquire into any damages which FSB may have sustained as a result.

In so deciding, we hope that the parties will take another look at themselves. They may yet find redemption if only they practise what they so eloquently preached:

> Let us join our hands together
> To bind the colours of our skin
> A rainbow under God's great heaven
> A sign that love will always win.

Appeal allowed.

Reported by Lim Kuan Yew